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No. 11382

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and
JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

APPELLANTS' OPENING BRIEF.

McLAUGHLIN, MCGINLEY & HANSON,
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APPELLANTS' OPENING BRIEF.

Statement of Pleadings and Facts.

The indictment in this case was filed in the Southern District of California, Central Division, on March 11, 1946. It charged the three appealing defendants in Count 1 with violating Section 88 of Title 18, U. S. C. A., that is, with a conspiracy to violate the provisions of the Emergency Price Control Act of 1942 (Sections 901 *et seq.* of Title 50, U. S. C. A.). The remaining thirty-nine counts charged specific violations of this Act in that the three defendants were accused of making sales of wholesale cuts of meat in excess of ceiling prices and with failing to keep accurate records of their sales as required by the regulations of the Office of Price Administration.

Prior to submission of the case to the jury, the government dismissed Counts 12, 13, 14, 15, 19, 26, 27, 28, 29,

34, 35, 36, 37, 38, 39 and 40, leaving the remaining twenty-four counts for submission to the jury. The jury returned verdicts of guilty against William Shubin and Jack L. Kissel on all of these counts. As to Frederick A. Shubin, it returned a verdict of guilty on Counts 1, 16, 17, 18, 20, 21 and 22, and of not guilty as to all the remaining counts. He was found guilty only on the conspiracy count and on the counts charging the keeping of incorrect records as to sales, and was not found guilty on counts charging sales at over-ceiling prices.

The District Court imposed fines and jail sentences on William Shubin and Jack L. Kissel each of \$5,000.00 on the conspiracy count and \$1,000.00 as to each of the remaining counts on which they were found guilty. [R. 56-63.] The aggregate fines imposed on those two defendants was therefore \$28,000.00 each. The court also imposed a sentence of imprisonment of one year in the county jail on the conspiracy count, and of six months in the county jail on each of the other twenty-three counts with the direction that the jail sentences run concurrently.

The court fined Frederick A. Shubin \$2500.00 on the conspiracy count and \$500.00 on each of the remaining six counts as to which he was found guilty. He was given a six-month jail sentence on Count 1, and a three-month jail sentence on each of the other six counts, with the provision that all such sentences run concurrently. [R. 59-61.]

The collective fines imposed on these three defendants total \$61,500.00. in addition to the time which they must spend in prison.

The jurisdiction of the District Court over the offenses charged is sustained by Section 546 of Title 18, U. S. C. A., and by Section 41 (2) of Title 28 of U. S. C. A., as to the conspiracy and other counts. In addition, Sec-

tion 925 (c) of Title 50 of U. S. C. A. expressly confers jurisdiction on such court for violation of the criminal statutes relating to the Emergency Price Control Act of 1942.

Jurisdiction of this court to determine this appeal is conferred by Section 225 of Title 28, U. S. C. A.

Count 1 of the indictment charged that the three appellants since November of 1942 and continuously thereafter have conspired to refuse to sell meat except for prices in excess of those permitted under the Emergency Price Control Act and in the Maximum Price Regulations Numbers 148, 169 and 239. It also charged such a conspiracy to sell meat in excess of maximum prices permitted by such statute and regulations, and a conspiracy to make false and fictitious entries upon the appellants' records in connection with sales of meat in violation of such act and regulations. [R. 3-8.] That count charges a series of overt acts which will be hereinafter discussed in connection with the argument as to the insufficiency of the evidence on this count.

The remaining counts involved on this appeal charge sales by the appellants of wholesale cuts of meat over ceiling and the maintenance of false records relating to such sales. [R. 9-29.] It is not necessary to deal with the pleadings in each of these counts separately as they all fall into the same pattern. Collectively they involve sales to three purchasers and the counts pertaining to false invoices also relate to sales made to one or the other of those three purchasers between the dates of January 4, 1944, and November 15, 1945.

The following summary sets forth the basic elements of each count:

Count Number	Government's Exhibit No.	Invoice Price	Name of Purchaser	Offense Charged
2	5	\$ 74.08	Dvorak	Sale over ceiling
3	6	53.82	Dvorak	Sale over ceiling
4	7	76.58	Dvorak	Sale over ceiling
5	8	111.27	Dvorak	Sale over ceiling
6	9	66.66	Dvorak	Sale over ceiling
7	10	246.40	Dvorak	Sale over ceiling
8	11	45.50	Dvorak	Sale over ceiling
9	12	121.77	Dvorak	Sale over ceiling
10	34	152.57	Snider	Sale over ceiling
11	25	36.96	Veuhoff	Sale over ceiling
16	13	247.26	Dvorak	False invoice
17	14	89.10	Dvorak	False invoice
18	15	169.35	Dvorak	False invoice
20	16	319.89	Dvorak	False invoice
21	17	184.95	Dvorak	False invoice
22	18	453.17	Dvorak	False invoice
23	32	124.80	Snider	Sale over ceiling
24	31	55.04	Snider	Sale over ceiling
25	33	126.42	Snider	Sale over ceiling
30	26	199.01	Veuhoff	Sale over ceiling
31	27	153.28	Veuhoff	Sale over ceiling
32	28	177.64	Veuhoff	Sale over ceiling
33	29	124.10	Veuhoff	Sale over ceiling
Total		\$3,409.62		

The only evidence specifically directed to proving alleged overcharges with respect to the above mentioned counts was testimony given by the three above mentioned purchasers, each of whose testimony was restricted to the transactions in which he had been involved. The Government's Exhibit number listed above relates in each instance to an invoice relating to the sale involved, and it was stipulated that the prices shown on the invoices were the

ceiling prices. Passing for the time being the insufficiency of the testimony of the above three witnesses because of their uncertainty as to whom they made the overpayments, it should be noted that the total overcharges shown by the testimony of these witnesses aggregate approximately \$500.00. This is an approximation computed by us from the testimony of these three witnesses as to their over-ceiling payments.

Three invoices were received in connection with proof of overt acts as charged in the conspiracy count, subparagraphs (r), (s) and (t). These were Exhibits 20, 21 and 22, all of which the government claims to be false invoices issued by the defendants to the witness Dvorak in connection with sales of meat. The aggregate invoice price of these three invoices is \$302.19, and the government witness Dvorak testified that the overcharges on these three transactions were \$40.51.

Brief Statement of Questions Involved.

The questions to be presented on this appeal involve:

1. Error in the admission of prejudicial evidence;
2. Error in refusing to receive evidence;
3. Error in refusing instructions requested by appellants;
4. Insufficiency of the evidence to sustain the verdict and judgment; and
5. Excessiveness of the fines and sentences.

The first four of these general questions overlap in some instances in that the same question of law may be involved. On the other hand, the grounds of the error vary in that several propositions of law are involved under each of those four general questions above set

forth. We will endeavor to group the errors for treatment according to the question of law involved.

We will not devote any separate subdivision to the excessiveness of the punishment. We realize that this is a matter generally within the province of the trial court, but we know of no case in this District wherein such severe penalties have been imposed for offenses of this type involving persons having no prior criminal record.

The conviction was obtained wholly on inadmissible evidence, and if such evidence had been excluded, there would have been insufficient evidence to warrant the submission of the case to the jury.

The questions will be dealt with in the following order :

1. The District Court erred in overruling objections of appellants to testimony of witnesses wherein the witnesses could not designate with which of the three appellants he had the transaction involved, but stated that it was one or the other of the defendants. It also failed to properly instruct the jury on the liability of one copartner for the acts of another partner.

2. The District Court erred in admitting testimony in the form of opinions and estimates as to the amount per pound which such witnesses paid in excess of ceiling and as to the number of times that such witnesses paid in excess of ceiling.

3. The issue of good faith was not properly presented to the jury.

4. The District Court erred in receiving in evidence and in denying defendants' motion to strike testimony of witnesses from the Bureau of Internal Revenue on each of the following grounds:

(a) The testimony given by those witnesses was from information obtained in the course of their official duties and was privileged and confidential and its disclosure constituted a violation of appellants' constitutional rights under the Fourth and Fifth Amendments.

(b) The testimony of those witnesses was from information obtained by them in the course of their official duties and the respondent did not lawfully obtain permission of the Commissioner of Internal Revenue to use the information which such witnesses had, in that there was no compliance with the laws and regulations relating to the obtaining or use of such information.

(c) Such witnesses, in testifying, admittedly refreshed their recollection from documents which the trial court held had not been lawfully obtained from the Commissioner of Internal Revenue, and which documents the court refused to admit into evidence for that reason. The trial court, nevertheless, erroneously permitted the use of such documents by the above three witnesses to refresh their recollection and to enable them to testify at the trial.

5. The District Court refused to admit supplemental income tax returns of the individual appellants on the ground that they had not been obtained from the Internal Revenue Department in compliance with the laws and rules and regulations relating to the use of income tax returns as evidence. Such court, nevertheless, erred in refusing to permit appellants' counsel to inquire into the extent to which such returns were used before the Grand Jury in obtaining the indictment after defendants' counsel had made a motion to quash the indictment.

6. As to appellants William Shubin and Frederick A. Shubin, the District Court erred in admitting into evidence an accountant's statement prepared under the supervision of appellants' tax attorney and delivered by such attorney to agents of the Department of Internal Revenue, there being no showing that said two appellants ever waived the privilege accorded to them under subsection 2 of Section 1881 of the Code of Civil Procedure of the State of California.

7. There was no evidence tending to show the existence of a conspiracy other than admissions made by the three appellants to the agents of the Bureau of Internal Revenue in connection with the preparation of supplemental income tax returns, and such admissions are insufficient to prove a conspiracy as they were not made in furtherance of any conspiracy, nor were they made by appellants in the presence of one another.

ARGUMENT.

POINT ONE.

The District Court Erred in Overruling Objections of Appellants to Testimony of Witnesses Wherein the Witnesses Could Not Designate With Which of the Three Appellants He Had the Transaction Involved, but Stated That It Was One or the Other of the Defendants. It Also Failed to Properly Instruct the Jury on the Liability of One Copartner for the Acts of Another Partner.

Emile Dvorak, Austin T. Snider and George Veuhoff, the only three witnesses who testified to having paid moneys in excess of ceiling to any of the defendants, were unable to designate more than a single instance where they paid these moneys to a particular one of these appellants. In that instance, after considerable vacillating, the witness Snider named Jack Kissel as the person to whom he paid the overcharge. [R. 235-238.] This testimony relates to Count 24, and if sufficient to convict Jack Kissel it is correspondingly insufficient to convict William Shubin.

In all other instances they testified: "It was either Bill or Jack," meaning William Shubin or Jack Kissel. They did not testify that it was one as distinguished from the other except in the above single instance, nor did they testify that on a single occasion both of such appellants were present at the time of such payment.

Such indefinite testimony permeates the entire record so we will quote the first instance of such testimony and refer to the portions of the record where the same answers were given in all of the other instances except the one above mentioned.

The witness Emile Dvorak, in answer to questions propounded by Mr. Neukom, the Government's counsel, testified as follows:

"Q. Did you pay to any party any additional sum for the purchase of meat reflected by this invoice?

The Court: Yes or no?

Mr. Neukom: Yes or no?

A. Yes, sir.

Q. And to whom, to your best recollection, did you pay it? A. To Bill or Jack.

Mr. McLaughlin: I move to strike that, your Honor, if he is not able to fix the party.

The Court: Counsel, that goes to the weight of the testimony. It is not as convincingly clear as if he could name specifically, but a person may answer in that way and it goes to the weight of his testimony, not to the admissibility." [R. 104-105.]

The following is an example of a similar ruling made as to Dvorak's testimony when he could not designate which one figured the overcharges:

"Q. And after you had received the invoice from the bookkeeper, what did you do about paying any other moneys? A. Well, it was figured out how much I owed them.

Mr. McLaughlin: I move to strike that.

The Court: Who figured it out?

The Witness: Either Bill or Jack.

Q. By Mr. Neukom: How did they do it? A. Just figured up what it amounted to and told me and I paid it.

Mr. McLaughlin: I move to strike because there is no statement as to who that party was in that

conversation and if you are going to have conversation he should fix the names of the parties there and who said it.

The Court: No, I think it goes to the weight of the testimony. It is not as certain as it could be if it were identified properly, but I believe it goes to the weight of it to be argued to the jury. Overruled and exception allowed. Proceed." [R. 171.]

Nearly every second page of the transcript of Dvorak's, Veuhoff's and Snider's testimony contains similar examples of such testimony. [R. 104-249.]

In no instance except the one above noted as to Veuhoff, was any witness able to testify that he had paid a specific appellant any overcharges.

That type of testimony has been held inadmissible as too uncertain on every occasion where the courts have been called upon to pass upon its admissibility. It has also been held insufficient to sustain a verdict as to either of such alternate defendants.

See

Reavis v. U. S. (C. C. A., Okla.), 93 F. (2d) 307;

People v. Woody, 45 Cal. 289;

Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49;

Rex v. Upton, 9 Ont. W. N. 74, 26 Dom. L. R. 208.

In 23 Corpus Juris Secundum the rule is stated at page 194 as follows:

"Testimony as to the identity of accused should be considered with caution; but there is no rule of law that testimony identifying a party must be subjected to the closest scrutiny. However, the identification

should be reasonably clear and unequivocal; and the identity of accused as the person who committed the crime must be established beyond a reasonable doubt."

The prejudice resulting to appellants William Shubin and Jack Kissel from such vague testimony is evidenced by the fact that they were both found guilty on all of the twenty-four counts which the government did not voluntarily dismiss. Yet, if the testimony were given a construction most favorable to the government, it could not have justified a verdict against more than one of these two defendants as to any of these counts.

The fact that none of these three witnesses ever designated Frederick Shubin as the recipient of these overpayments is the reason that he was not found guilty on any of the counts involving sales over ceiling. If the witnesses had been precise in designating whether it was "Bill or Jack," it is obvious that at least one of these two appellants would also have been exonerated on each of these counts.

This error was aggravated by the refusal of the District Court to give appellants' requested instruction No. 10, as follows:

"One partner cannot be prosecuted for a crime committed by his copartner so long as the partnership is engaged in a lawful business or enterprise, unless such partner performed the criminal act as a part of the partnership business and with the knowledge and consent of such other partner. Except as herein stated, neither the firm nor a partner is chargeable criminally with the acts of a copartner merely by reason of the partnership relation."

See

Levin v. U. S. (9th Cir.), 5 F. (2d) 598 at 603;

Pearson v. U. S. (9th Cir.), 147 F. (2d) 950 at 952;

U. S. v. Food and Grocery Bureau of So. Calif.
(D. C., Cal.), 43 Fed. Supp. 966 at 971;

47 Corpus Juris 907; and

22 Corpus Juris Secundum 149 *et seq.*

POINT TWO.

The District Court Erred in Admitting Testimony in the Form of Opinions and Estimates as to the Amount per Pound Which Such Witnesses Paid in Excess of Ceiling and as to the Number of Times That Such Witnesses Paid in Excess of Ceiling.

The testimony of the witnesses Dvorak and Snider, as to the amount paid in excess of ceiling, was too speculative to be of any value.

The witness Emile Dvorak testified:

“Q. Are you in any position to recall, to your best recollection, how much more per pound, if any, you paid for each of the respective items reflected on Government’s Exhibit No. 5 in evidence?

Mr. McLaughlin: Objected to as calling for a conclusion. If he does not know how much he paid totally, he certainly could not testify how much more per pound he paid, either.

The Court: Oh, no, counsel; that does not follow. That is a matter of mathematics. Overruled.

Q. By Mr. Neukom: Do you know how much, if any, you paid per pound more for the shortcuts on the date in question?

Mr. McLaughlin: The same objection, your Honor.

The Court: Yes; the same objection and the same ruling.

Mr. Neukom: The best of your recollection?

A. Well, it would be very hard for me to just say exactly how much I paid over ceiling on that one particular date, as the price varied.

Q. What is your best recollection?

Mr. McLaughlin: Your Honor, I think he has asked that and he answered it.

The Court: No. He is entitled to answer it fully, if he can.

A. Well, in 1944 I would say I was paying five cents a pound over ceiling for shortcut pork loins.

Q. By Mr. Neukom: Now, for the New York; is that the next item? A. Yes; three cents over ceiling.

Q. And for the—what is the third item? A. The smoked boned ready to eat ham, or smoked hams, ready to eat.

Q. Do you recall how much more per pound, if any, you were paying on that date? A. Well, I paid over, but to tell you exactly how much I paid for that, I just can't remember.

Q. What is your best recollection? A. Well—

Mr. McLaughlin: The same objection.

The Court: Yes; the same ruling.

A. The prices varied, as I said before, and in the length of time that I done business with him it is

pretty hard for me to remember, as I didn't keep track of anything.

Q. By Mr. Neukom: Well, what is your recollection? A. Well, I would say I paid about 8 cents at that time.

Mr. McLaughlin: Your Honor, I move to strike the answer on the ground it is a speculation or a guess. He said, 'I would say I did,' and he has already said he had no recollection.

The Witness: Of the exact amount no.

The Court: Oh, no. That just goes to the weight of the testimony, counsel.

Mr. Neukom: Just wait for his Honor.

The Court: Of course, it is not as satisfactory as an exact amount, but a witness may testify to that extent. Proceed." [R. 107-109.]

The examination by plaintiff's attorney of the witness continued as follows:

"Q. By Mr. Neukom: Do you recall whether or not you ever paid to Jack Kissel a sum of money in addition to the invoice price of the meat that you took away? A. Yes.

Q. Have you any recollection of about how many instances in the period of over two years that you conducted business with these partners that you paid Jack Kissel? A. I do not remember.

Q. Do you have an approximation? Was it more than one time?

Mr. McLaughlin: Just a moment. Your Honor, I submit that that is too vague and indefinite. We have no way to meet it and it does not tie down to any particular count or invoice.

The Court: Well, I assume that would have to be connected up to be of any value as evidence, but it is proper for the witness to state whether it was once, twice, or ten times and then the details will have to be developed to make it of any value to the jury.

The Witness: I would say several times.

Q. By Mr. Neukom: Well, is several more than—what do you mean by several? A. Well, lots of times. I can't put my finger on how many times.

The Court: Just say once, twice, or five times. That is what counsel is asking for.

The Witness: Okay, five times.

The Court: No, I want you to tell me.

The Witness: Well, I just don't remember how many times I paid him over the ceiling.

The Court: Just the best of your recollection.

Q. By Mr. Neukom: The best of your recollection is all that we are asking for, Mr. Dvorak. A. Ten times.

The Court: All right." [R. 132-133.]

"Q. Do you recall approximately how many times you paid Mr. William Shubin in excess of the amount which was shown on the invoice for the items that you secured from his establishment?

Mr. McLaughlin: The same objection unless it is connected up, your Honor. It is immaterial and too vague.

The Court: Overruled. Proceed. Your best recollection.

The Witness: Well, a half a dozen times." [R. 134.]

The unfairness of this type of testimony is emphasized when we remember that the witness was unable on a single occasion to state whether he had paid Bill Shubin or Jack Kissel.

The witness Snider's testimony is even more vulnerable to this objection. He first could remember nothing, then after the noon recess his memory was quite good, but he admitted on cross-examination that the pencil memoranda from which he refreshed his memory were made long after the transactions involved.

This portion of his testimony is as follows:

"Q. By Mr. Neukom: Do you have a definite personal recollection of how much you paid over the invoice price per pound without looking at some writing on the invoice? A. Of this particular bill?

Q. Yes. A. I cannot say truthfully I recall.

Q. Did you make any writing upon the bill after the transaction in question that assists you in your recollection? A. This writing is writing that was placed there—

The Court: No. Listen to the question. Repeat the question. Miss Bennallack.

(Question read.)

The Court: Yes or no.

The Witness: No." [R. 235.]

At this point the noon recess intervened, following which the witness continued:

"By Mr. Neukom:

I do have a present recollection by refreshing my memory from looking at invoice, Government's Exhibit 31 for identification (offered in support of Count 24), of having purchased the pork shown on

the invoice, for which I paid \$55.04, and in addition thereto I paid 8¢ per pound therefor to Jack Kissel, to the best of my recollection.”

Thereupon, Plaintiff’s Exhibit No. 31 for Identification was offered in evidence, and the following proceedings were had:

“Mr. McLaughlin: Before it is received, I think the record should show—I want to make an objection that it is immaterial; and further, that this is the transaction which the witness this morning said that he did not remember, and then he was asked about notations on the back of the invoice, and apparently counsel for the Government have not seen fit to ask him anything further about it at all, but his mind has been refreshed.

The Court: In evidence.

The Clerk: Government’s Exhibit No. 31 in evidence.

(The witness continuing):

By Mr. Neukom:

Government’s Exhibit No. 32 for Identification (offered in support of Count 23), being an invoice dated November 29, 1944, in the amount of \$121.80, shows the items of meat purchased by me on that date. I paid the amount shown on the invoice, and in addition I paid to Bill Shubin or Jack Kissel 5¢ per pound over for the bellies and 8¢ per pound over on the hogs, and nothing over on the back fat.”

Plaintiff’s Exhibit No. 32 for Identification was thereupon received in evidence as Plaintiff’s Exhibit No. 32.

“Government’s Exhibit No. 33 for Identification (offered in support of Count 25), bearing invoice

No. 47882, dated February 26, 1945, in the amount of \$126.42, represents the meat which I purchased on that date, and for which I paid the amount shown on the invoice, and also paid 8¢ per pound more to either Jack Kissel or Bill Shubin.”

Plaintiff's Exhibit No. 33 for Identification was there-upon received in evidence as Plaintiff's Exhibit No. 33.

“Government's Exhibit No. 34 for Identification (offered in support of Count 10), bearing Invoice No. 47443, dated February 16, 1945, in the amount of \$152.27, represents the meat which I purchased on that date, and for which I paid the amount shown on the invoice, and also an additional amount of 3¢ per pound to either Jack or Bill.”

Plaintiff's Exhibit No. 34 for Identification was there-upon received in evidence as Plaintiff's Exhibit No. 34. [R. 235-244.]

On cross-examination the witness Snider testified as follows:

“Before the lunch hour, I was shown one of these invoices which has been received in evidence, and I could not recall the incidents which took place at the time of the purchase therein. The pencil notations on the backs of the invoices (Government's Exhibits No. 31 and No. 32) I was shown were written by me some time in the fall of 1945, when some gentlemen from the O. P. A. came to my house. The date when they came to my house might have been in the early part of 1946.” [R. 245-248.] “I never had a discussion with any of the defendants regarding their not selling me any meat unless I paid them in excess of ceiling.” [R. 249.]

POINT THREE.

The Issue of Defendants' Good Faith Was Not Properly Presented to the Jury.

The appellants should not have been subjected to the severe penalties imposed by the trial court on testimony as nebulous as that of the witnesses Dvorak and Snider. While we contend that such testimony alone was sufficient to deprive appellants of a fair trial, it was only a part of the prejudice that they suffered at the trial.

Neither the witnesses Dvorak nor Snider could designate a single instance where they had been asked or required to pay a cent in excess of ceiling by any of the appellants. Veuhoff did testify that William Shubin would add the amount of the overcharge on the adding machine and give him the total amount of the overcharge, but this testimony was not tied down to any particular count. [R. 205.] In no instance was this witness able to positively testify whether he paid the overcharge to William Shubin or Jack Kissel as to any of the five counts involving him.

The witness Snider, on cross-examination, positively denied that he had ever been requested to pay over ceiling. His testimony is as follows:

“Q. Did you have a discussion with any of the defendants regarding their not selling you any meat unless you paid in excess of ceiling?

The Witness: Repeat that, please.

The Court: Mr. Reporter?

(Question read by the reporter.)

A. No; I didn't.” [R. 249.]

The witness Dvorak was not as direct, but his cross-examination shows not a single instance where he was told to pay over ceiling.

His testimony on direct examination left a possible inference that he might have been so told, so he was cross-examined on this at length. This cross-examination showed that he had never been so requested by any of the appellants. [R. 184-190.] We refrain from quoting testimony only because of the limitations on the length of this brief, as it shows how difficult it was to tie the witness down to an answer to such a simple question.

Undoubtedly the shortage of commodities and services have stimulated the practice of tipping and similar gratuities. Regardless of the undesirability of the extension of this tipping practice, it is not a violation of the O. P. A. as long as it was not extracted as a condition to the sale. In this connection, it should be noted that the witness Dvorak testified that he paid appellants over ceiling at times when meat was plentiful and easily available in Los Angeles. If he was being required to pay over ceiling, it is inconceivable that he would have continued to buy from appellants at times when he could have bought competitively elsewhere.

The substance of his testimony on cross-examination in this connection is as follows:

“Frequently, during the war, the lockers and the refrigerators of the meat plants in Los Angeles were filled with meat, and the only obstacle to purchasing meats was lack of red points. In the instances where I paid over ceiling for meat I also paid the regular

amount of red points. When there were excess supplies of meat on hand, I was not solicited by the packing houses or wholesalers to purchase meats, but I continued to pay over ceiling for the meats that I purchased." [R. 190-191.]

If the appellants did not request or require the payment of over ceiling prices, they were at least entitled to an instruction on the issue of their good faith. There is nothing in the law or regulations which prevents a seller from receiving a gratuity so long as it is not expressly or impliedly made a condition to the sale.

Before alluding to the refused instructions on good faith, it should be noted that the government not only failed to prove that appellants had knowledge of the regulations, but it also failed to prove the terms of any of the regulations. All of these circumstances are relevant on the issue of good faith as to which each of the following instructions requested by appellants was refused:

"A contrivance or device to evade provisions of an Office of Price Administration regulation may be unlawful; yet, if the defendant in good faith conscientiously believes that he was not violating the law in anything that he did or failed to do, as shown by the evidence, then he is not guilty of wilfully violating such regulation. This is true, notwithstanding that his act or omission may as a matter of law constitute an evasion of the provisions of a regulation." [R. 40.]

"Before rendering a verdict against any defendant, you must be satisfied beyond a reasonable doubt that such defendant or defendants had knowledge of the

provision of the regulation violated, and that such defendant or defendants nevertheless intentionally violated such regulation by committing an act contrary thereto.” [R. 41.]

“If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, that does not constitute a violation of the regulations or the law involved, and if you should find that any of the counts in this indictment involve any such transaction or transactions with respect to a purchaser, then you shall find for the defendants.” [R. 42.]

“If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, it is for you to determine whether such additional moneys were given to the defendant or defendants by way of gratuity or as further consideration for the purchase of the meat.” [R. 43.]

The above instructions on good faith were approved in *United States v. Steiner* (Cir. Ct., 7th Cir., 1945), 152 F. (2d) 484, where defendants were indicted for violating the Emergency Price Control Act in that they, as auctioneers, sold agricultural implements in excess of ceiling. The evidence showed that they had executed documents designated as leases of the equipment in order to circumvent the provisions relating to sales.

In discussing the elements of wilfulness and knowledge, the court said at page 488:

“It afterwards gave, at the request of the defendant Steiner, the following instruction in cause No. 8806:

‘While a deceitful contrivance or fraudulent device to evade the provisions of a lawful regulation may not be legally resorted to for effective accomplishment of the evasion, yet if the defendant, in good faith, conscientiously believed that he was not violating the law in anything that he did or failed to do as shown by the evidence, he is not guilty of wilfully violating the regulation. This is true notwithstanding his act or omission may, as a matter of law, constitute an evasion of the provisions of a regulation.’

This instruction was given by the court of its own motion in cause No. 8818, and it properly left to the jury the question of the good faith and wilfulness of the defendant in each appeal.”

On the question of good faith:

- (1) There was no evidence of guilty knowledge;
- (2) There was no evidence of any knowledge of the terms of the regulations involved;
- (3) There was no evidence of any terms of any regulation which precluded the taking of a gratuity, or in fact of any terms of any regulation;
- (4) There was no evidence of the promulgation or publication in the Federal Register of any of these regulations.

POINT FOUR.

Appellants Were Deprived of a Fair Trial by the Government's Use of Inadmissible and Prejudicial Testimony of Agents of the Department of Internal Revenue.

We have heretofore demonstrated the insufficiency of the evidence given by the three witnesses who purchased meat from appellants. We come now to an entirely different type of evidence which the government relied upon. This second segment of the government's case consisted of testimony as to admissions or confessions of general guilt made by the various appellants to the internal revenue agents after appellants had voluntarily filed amended income tax returns.

None of these admissions are tied down to the overt acts charged in any of the counts, but if competent and properly admissible they do show that defendants had been selling their products at over ceiling prices. The effect of such evidence was to automatically prejudice the jury and the trial judge against these appellants.

The appellants' constitutional rights were violated by the receipt of such evidence, and the trial court adopted an inconsistent position in that it held that written signed statements made by appellants to the internal revenue agents were not admissible because not legally obtained from the Commissioner of Internal Revenue; but nevertheless permitted these agents to testify to the contents of such written statements by admitting their testimony of the oral statements which had been reduced to these written statements by a shorthand stenographer. It did this

even though these agents admitted that, before testifying, they had refreshed their recollections by reading the written statements which the trial court had rejected as improper evidence.

These three statements were marked Government's Exhibits Numbers 50, 51 and 52, and have been incorporated in the record at pages 473 to 545, because of the importance that they played in use in refreshing witnesses' testimony and in the preparation of the government's case.

The United States courts have unrelentingly adhered to the principle that an accused should not be convicted by evidence unlawfully obtained. and that it is of far greater importance to preserve these safeguards to liberty and justice than to accomplish a conviction of one, no matter how guilty he may be.

One of the most recent of such expressions is found in *Bollenbach v. U. S.*, 90 L. Ed. 318, 66 S. Ct. Rep. 403, where the court said at page 406:

"In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

The internal revenue agents who were called by the government to testify as to appellants' confessions to them gave substantially the same testimony over objection of appellants' counsel. This testimony followed the trial

court's exclusion of the written stenographic reports which the internal revenue agents had taken at the time of these confessions. This ruling of the trial court was made after extensive argument and discussion by counsel for both sides and the court. [R. 284-309.]

We will later deal more specifically with the contents of these confessions, and the facts relating to their procurement and use by the government's counsel. It is first appropriate to observe the statutes and treasury regulations governing the use of information in the possession of the Internal Revenue Department, because if such information was not admissible in evidence, as the District Court held that the written documents were not, then it is apparent that none of such information or documents should have been used either in the preparation of this case, the procuring of the indictment, or by witnesses to refresh their memories.

Section 55 of Title 26, U. S. C. A., governs the use of income tax returns. It provides that they shall be open to inspection and copies furnished "only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."

These rules may be found in Commerce Clearing House on Taxation, and the pertinent ones are as follows:

T. D. 4945, Sec. 463D.4 (C. C. H., par. 517, p. 3124), entitled "Use of Returns in Litigation," provides:

"The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in

litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

T. D. 4945, Sec. 463D.5 (C. C. H., par. 518), entitled "Furnishing of Copies of Returns," provides as follows:

"A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or of an internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or agent in charge may furnish a copy of such return to a United States Attorney or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations.

Certified copies will be furnished only upon specific request therefor sent to the Commissioner at Washington.”

The above regulations relate to income tax returns, but the information embodied in the written confessions is subject to the same restrictions.

T. D. 4929, Sec. 463C.35 (C. C. H., par. 506), entitled “Information Returns,” provides as follows:

“Information returns, schedules, lists and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return.”

In *Gibson v. U. S.* (9th Cir.), 31 F. (2d) 19 at 22, the court characterized such a taxpayer’s statement in affidavit form as in the nature of a supplemental return and covered by the above quoted regulations.

The testimony of both Internal Revenue Agent James Bryant Eustice and Donald Oliver Bircher consumes extensive space in the record. [Eustice, R. 310-371; Bircher, 265-275 and 371-432.] To quote the full substance of both these witnesses’ testimony would be repetitious and unnecessary. The testimony, the objections thereto and the rulings of the trial court were the same with respect to both of these witnesses. The most that can be said is that one merely aggravated the prejudice already wrought by the other.

If anything, Bircher's testimony was the most complete so we will set forth the full substance of his testimony instead of that of Eustice.

The witness Donald Oliver Bircher testified in substance as follows:

I am a special agent of the Bureau of Internal Revenue. I interviewed William Shubin in the office of the Bureau of Internal Revenue in Los Angeles on the morning of July 24, 1945, and Frederick Shubin on the afternoon of that day, and Jack Kissel on August 1st. In addition to the particular defendant being interviewed at such time there were present special agents of the internal revenue department, Samuel J. Phoebus and Walter Schlick, and also one of our office stenographers, who took down the interview in question and answer form. There was also present Mr. Joseph Brady and Mr. Stanley Anderson, attorneys for the defendants. At the beginning of each of these interviews I advised the defendant present that any statements he made or any documents or evidence he produced at such hearing could be used in any subsequent proceeding by the government, and that he was not required to incriminate himself and that he had the right to refuse to answer any questions if he felt that the answers might incriminate him. I also asked him if he wished his attorneys to amplify that advice, and the attorneys did give him further advice.

Each of the defendants had appeared at the time of his particular interview without subpoena, and each of them indicated that he would willingly and truthfully answer all questions. At these interviews I was investigating the source of the income of the partnership of the three defendants operated under

the name of Vernon Hotel and Restaurant Supply Company, and the individual returns of the three defendants for the years of 1942, 1943 and 1944, as to which the defendants had filed amended returns.

At the beginning of each of the interviews there was a discussion off the record which our reporter did not take down. [R. 372-376.]

The witness was then shown Plaintiff's Exhibits Numbers 50, 51 and 52 for identification, and thereupon the following proceedings were had:

"Mr. McLaughlin: Well, at this time, your Honor, I object to any further questioning on that transaction on the ground that it is an indirect attempt to put into evidence statements made by these parties which are taken down in writing and which are in substance embodied as supplemental returns.

Now, in these cases we were discussing yesterday these very things I mentioned. It characterizes them as in the nature of supplemental returns and to permit a witness to testify to a discussion and conversation which was nothing more than a running question and answer affair which was put down on paper and signed is, I submit, in controversion of the regulation and the Act which we were arguing yesterday.

The Court: No, I don't believe so, counsel. I think that the Act pertains to returns or supplemental returns that are filed in which there is no preliminary such as we have here now. The court looks upon it as a complete waiver. The defendants appeared and offered to make these statements and were told that they might be used subsequently. No objection was made and I believe that comes under the statutory provisions that we discussed yesterday.

I will overrule it and allow an exception to the defendants." [R. 376-377.]

Thereupon it was stipulated that the defendants could preserve the objection last made to the testimony of the witness on the ground that its use violated the statute and the regulation relating to the admissibility of internal revenue returns and supplemental returns and other information in the possession of the Bureau of Internal Revenue, and on the further ground that it was not properly admissible evidence and was immaterial, and the court stated that such objection should stand to all of the witness' testimony and would be overruled and an exception allowed. [R. 377.]

The substance of the testimony of the witness Donald O. Bircher continued as follows:

The defendant William Shubin told me that the excess amount which they had reported in their amended returns of approximately \$141,000.00 represented overcharges which they had collected from customers in connection with the sale of meat, that is, in excess of ceiling prices. He told me that the correct price was billed on their invoices, and usually paid by the customer by check, and that the overcharges were collected in secret in the form of cash, and that some customers were charged a higher overcharge than others. William Shubin said that he kept a temporary record of the overcharges which had not been paid by customers, and that as they were paid, the name of such customer was stricken from the temporary list, and when all overcharges were paid the temporary list was destroyed. He stated that he kept the money concealed at his house, and

that he only overcharged what he thought was a reasonable sum at that time, and when he was getting a higher price for lard, he didn't have to overcharge so much on other commodities to keep things running smoothly, and that the customers did not have to be plodded about making their payments of the overcharges, as they had been trained. He said he did not enter overcharges as a rule on the books because he did not want the OPA to find out about them. [R. 377-382.]

The witness then testified (on *voir dire* by Mr. McLaughlin) as follows:

"Mr. McLaughlin: May I ask a few more questions?"

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you? A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them? A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or

three days? A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon? A. I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have any other questions." [R. 400-401.]

The witness continued on direct examination subject to the objections heretofore made, and his testimony was in substance as follows:

On August 1, 1945, when Jack Kissel appeared with his attorneys, Joseph Brady and Stanley Anderson, for the purpose of giving his voluntary statement, he delivered to me Mr. Rausch's audit [Government's Exhibit No. 58 for Identification]; that is,

Stanley Anderson handed it to me in the presence of Jack Kissel, and Jack Kissel said it represented Mr. Rausch's audit. [R. 404.]

Thereupon the following proceedings took place:

"Mr. Strong: I offer this into evidence, your Honor.

Mr. McLaughlin: Just a minute. May I ask the witness a few questions?

Mr. Strong: Yes.

The Court: Yes.

Q. By Mr. McLaughlin: Was Mr. Kissel there?

A. Yes.

Q. And who else was there among the defendants?

A. No other defendant. Attorney Joseph Brady and Attorney Stanley Anderson for Mr. Kissel.

Q. That document was handed to you in connection with information relating to their personal returns? A. No, the audit itself and the report says it is in connection with an audit of the Vernon Hotel & Restaurant Supply Company; and it is so captioned in that opening statement.

Q. But you were investigating—pardon me, go ahead. A. And it is so captioned in the cover letter which is signed by Mr. Rausch, and which letter is dated July 24, 1945.

Q. Well, at that time you were investigating and had under your investigation the matters of the individual returns of William and Frederick Shubin and Jack Kissel, did you not? A. Yes; also the tax on the income of the partnership, which had to be determined first.

Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another docu-

ment which comes within the category of a supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness—I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's record at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present but not the two Shubins. They were not present when this was delivered.

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed." [R. 404-407.]

The witness continued his testimony as to Frederick Shubin as follows:

"Q. Now, will you relate what questions you asked the defendant Frederick Shubin and what answers you got during that conference in connection with the income and source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Before that question is answered, may I ask the witness a few questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, when did you last read the written statement of Frederick Shubin? A. I glanced at it this noon, but I don't think I have read it completely for many months.

Q. When you say you glanced at it do you mean that you looked at and read the front sheet, and then passed over, or did you turn the pages and look at several pages? A. I looked at several different pages, but I was hungry and I didn't take time to read them all in detail.

Q. You did not read it entirely through? A. That is correct.

Q. Were you conferring with Mr. Strong this noon about the contents? A. No; I have not.

Q. Before you came to court this morning did you look at the statement of Frederick Shubin? A. Yes; I reviewed them all last night casually.

Q. Well, when you say 'casually' do you mean you read them or you did not? A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them? A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? A. Yes.

Q. To keep your memory refreshed? Now, are you able to state today what things Frederick Shubin

said to you, without recalling what you have read at these times from the statements?

Mr. Strong: I object to that, your Honor.

The Court: Oh, I will permit it to be answered.

A. Yes; I can state in substance what was said without refreshing my memory. I know what was said.

Q. By Mr. McLaughlin: Could you have done that before you read it last night? A. Yes.

Q. You could? A. Yes.

The Court: Proceed, gentlemen.

Mr. McLaughlin: Before he proceeds, I want to make the objection so I won't be interrupting, to his testimony regarding the discussions with Mr. Shubin on the ground that he is testifying from documents and from conversations that were given in the course of his official duties as a Collector of Internal Revenue at the time that the defendants Frederick Shubin was performing his official duties and giving information that was confidential, and his testimony is in effect testimony as to the contents of documents which he has seen and read constantly since the time it was taken.

Mr. Strong: I am going to state, your Honor, that there is nothing here and nothing that I know of in the law which makes the testimony of Frederick Shubin confidential. He gave it voluntarily to these people in support of his own claim in connection with his own income tax returns. He was trying to justify certain things he did.

The Court: Overruled and exception. Proceed."
[R. 416-420.]

The substance of the witness' testimony with respect to Frederick Shubin's statements was substantially the same as his testimony as to the statements of the other two defendants. [R. 420-424.]

He also testified on *voir dire* examination, in answer to the questions of the defendants' counsel, that he had read the statement of Jack Kissel many times since he received the Commissioner's letter of authority, in order to refresh his recollection. [R. 424-426.] Following that, the following objection was again made to his testimony:

"Mr. McLaughlin: That is all the questions I have. And, if your Honor please, I wish to object, stating the same grounds as stated, as the basis of the objection to the testimony regarding the other two discussions, that is, with the two Mr. Shubins; and I wish to have it stipulated that my objection goes to all these questions and answers so that I won't have to object every time.

The Court: It will be so understood. Overruled. Proceed." [R. 426.]

The District Court in sustaining appellants' objection to the written confessions because there was no showing of a request made to the Commissioner for the returns of appellants, as required by the above quoted Treasury Regulation, said that the statute would be meaningless if it did not intend rules by which discretion was to be exercised to be complied with. Its specific language is as follows:

"The Court: But now, assuming that is correct, would it not be necessary in order to comply with the statute to get the same authority in order to secure

the information that you requested from the Commissioner?

In other words, counsel, the statute was passed by Congress for a definite purpose and a very proper purpose and that was to keep as secret in the files of the government of the United States all of the returns on of taxpayers.

The same applies to examinations of national banks and heavy penalties are imposed upon divulging any information secured by those departments.

Now, Congress saw fit to make some exceptions, and in order to take advantage of those exceptions the statute in my opinion must be strictly complied with." [R. 303-304.]

* * * * *

"The Court: Now, there is no request made under the statute for the information with reference to these individuals. Now, can the court so construe that statute and say, 'Well, it doesn't make any difference. We have got a name here anyway and anybody that is connected with that company, we can secure their returns?'

I assume that the Attorney-General and the Commissioner of Internal Revenue act with discretion under the statute. Now, the request was for the Vernon Hotel and Restaurant Supply Company, information about that company.

Mr. Neukom: Which is a co-partnership. Pardon my interruption.

The Court: Suppose there were 50 partners and the Attorney-General I assume would go down through there and say, 'Here are five that we didn't make a request for for some reason. We will not

permit that information to be divulged. We have other matters pending, or there are other matters in the Department so that we cannot furnish that.'

I assume that they all act with discretion. I don't believe that they just act without any consideration, otherwise the statute would be meaningless.

Now, the Attorney-General and the Commissioner of Internal Revenue have no information as far as these letters are concerned that the United States Attorney here desires information with reference to individuals and particularly when the United States Attorney did name individuals in connection with another case that I believe is pending in this court." [R. 307-308.]

The Act and the regulations in limiting access to, and the use of, returns were designed to protect the taxpayer, and a conviction based upon returns obtained without complying with these is erroneous. The testimony of the internal revenue agents shows clearly that they used the returns to refresh their recollections as to what appellants told them. In addition to this, their testimony was inadmissible even if not refreshed by reading the transcribed statements of appellants, because it was as to information given them by taxpayers while they were acting as internal revenue agents in the process of supplementing the files of the internal revenue department. It was given before a court reporter employed by the department for the purpose of being transcribed and then signed by appellants.

It is not necessary to pursue the discussion of this obvious principle. Section 463c.35 of the above quoted

Treasury Regulations expressly includes any "statements designed to be supplemental to, or to become a part of, the returns," as being subject to those regulations.

Evidence unlawfully obtained cannot be used in a criminal proceeding.

See

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319;

McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819;

Agnello v. U. S., 269 U. S. 145, 70 L. Ed. 145;

Gaule v. U. S., 255 U. S. 298, 65 L. Ed. 647;

Amos v. U. S., 255 U. S. 313, 65 L. Ed. 654;

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652;

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746;

Flagg v. U. S. (2nd Cir., 1916), 233 Fed. 481;

Walker v. U. S. (5th Cir., 1942), 125 F. (2d) 395; and

Rogers v. U. S. (1st Cir., 1938), 97 F. (2d) 691.

The language in all of these cases is pertinent, but in the interest of brevity, we quote only from *Silverthorne Lumber Co. v. U. S.* (251 U. S. at p. 391) as follows:

"The government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy

them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.* The numerous decisions, like *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372), holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are not authority in the present proceeding, as is explained in *Weeks v. United States*, 232 U. S. 383, 394, 395, 58 L. ed. 652, 656, 657, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117. Whether some of those decisions have gone too far, or have given wrong reasons, it is unnecessary to inquire; the principle applicable to the present case

seems to us plain. It is stated satisfactorily in *Flagg v. United States*, 147 C. C. A. 367, 233 Fed. 481, 483. In *Linn v. United States*, 163 C. C. A. 470, 251 Fed. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected *even if the same result might have been achieved in a lawful way.*" (Italics ours.)

Since the government failed to show that it had obtained the written statements in accordance with the procedure specified in the Treasury Regulations, we believe that each of the following propositions are clear:

(1) They were not admissible in evidence. The trial court sustained this principle.

(2) The agents' oral testimony was likewise inadmissible for the same reason that evidence of any statements of a taxpayer is improper unless the Treasury Regulations have been complied with.

(3) Such oral testimony was improperly received for the further reason that the witnesses admittedly refreshed their recollections from the inadmissible written statements.

WAIVER.

The trial court, in rejecting the last two principles, indicated that appellants had waived their right to object to the use of such evidence, because Donald O. Bircher testified that before taking appellants' statements, he ad-

vised them that such statements could be used against them in subsequent proceedings by the government. [R. 376.] It is obvious that there could not have been a waiver of the right to keep out the oral statements and, at the same time, no waiver of the right to exclude written statements, yet the trial court adhered steadfastly to its ruling that the written transcriptions of these oral statements were not admissible. In this latter position it was as correct as it was erroneous in its position as to the oral testimony of the appellants' admissions.

There is no evidence that appellants were ever asked to waive the provisions of the Treasury Regulations relating to the use by the government in any actions of their oral or written statements. In the absence of clear proof of such a waiver, it cannot be presumed.

In *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, the court had before it the question whether the accused had waived his right to legal counsel. In holding that there was no such waiver, the court said at page 464:

"It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Assuming, but not conceding, that appellants could legally waive compliance with these Treasury Regulations for all purposes, they did not so do, nor were they requested to do so.

The uncontroverted evidence shows that in giving these statements to the internal revenue agents, they did so with the express understanding that such statements would not be used in any investigation or prosecution involving OPA violations.

Mr. Joseph D. Brady, an attorney specializing in tax law, testified that prior to the investigation of the internal revenue agents, appellants had employed him to prepare their amended tax returns. [R. 460.] On direct examination the District Court refused to permit him to testify as to the understanding that he had with Mr. Bircher and the agents of the Internal Revenue Department regarding their limited use of the statements which appellants later made. [R. 461-462.] On cross-examination by government counsel, however, the court permitted him to testify as to his understanding with these agents immediately before the three appellants signed their statements. This testimony is as follows:

“Q. And you came in voluntarily to discuss the matter, didn’t you, Mr. Brady? A. Yes; pursuant to the understanding that I had.

Q. And it is true that at that time, among others, a question such as this was used of Mr. Shubin before he gave any replies: ‘You are advised, Mr. Shubin, that any statements you make at this hearing or conference, or any documents produced may be used by the Government in any subsequent proceedings, and

that you have the right to refuse to answer any questions that you feel might tend to incriminate you. Do you understand that, or do you wish your attorney to explain it to you?' You recall that such a question or explanation was made by Mr. Bircher to Mr. Shubin? A. That is right.

Q. And Mr. Shubin replied that: 'I believe I understand that,' did he not? A. If the record shows, and my recollection is he said substantially that.

Q. And is it not true that you also counselled with Mr. Shubin and there was some, as you attorneys call it, discussion off the record where you advised Mr. Shubin that it was proper to go ahead and answer the interrogatories that were given? A. I believe that is so.

Q. And it is true that at a later date, a few days later, after this report had been written up or the proceedings had been written up, that Mr. Shubin was accorded the privilege to come to the office of Mr. Bircher here in this building, was given the original and copies of the proceedings that had been taken, and did in your presence sign all of the documents which reflected the questions and answers? A. That is true, but only after a reiteration of the specific understanding that they were for the eyes of the Treasury Department only.

Mr. Neukom: May I move that the answer be stricken as not responsive?

The Court: That is stricken out, but I am going to permit the witness to state the conversations very completely if the question is asked. If not, I am going to permit the defense counsel to ask the question.

Mr. Neukom: Very well.

The Court: Proceed. Any other questions?

Mr. Neukom: Yes.

Q. And this is Mr. Shubin's signature that was signed to the document in question? A. It looks like it to me.

Q. And signed on August 13, 1945? A. I have no doubt that is the date.

Q. And the same policy in general was followed as to Frederick Shubin, only his matter was taken up in the afternoon, wasn't it, Mr. Brady? A. Oh, I think all the papers were signed at the same time, one particular morning. We may have stayed there until two o'clock.

Q. But I mean they were interrogated upon the same explanations, that whatever might be obtained might be used against them; isn't that correct? A. The same policy was followed.

Mr. Neukom: That is correct. I was referring to what was Government's Exhibit 50 for identification. That is all.

The Court: Mr. McLaughlin?

Redirect Examination

By Mr. McLaughlin:

Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it? A. Mr. Bircher was there in the early part of the morning. He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: 'It is the understanding, is it not, that these are for the eyes of the Treasury Department only?' and he answered, to my recollection, 'Yes.' [R. 465-467.]

Two of the internal revenue agents who had worked on appellants' records and elicited information from them testified to substantially the same understanding, indicating that it was never the intention of appellants to waive the provisions of these Treasury Regulations.

Samuel J. Phoebus, on being called by appellants' counsel, testified that while he was in the course of making an audit of appellants' books in August or September of 1945, he had a discussion with appellants Jack Kissel and William Shubin at their plant as follows:

"Q. Now, state what was said. A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the OPA and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to the things which he was telling us unless I was authorized to do so." [R. 449.]

The testimony of Special Agent Walter E. Schlick was substantially the same in that it shows there was no intentional or express waiver of these Treasury Regulations. It was as follows:

"Q. Do you recall a discussion that you were present at regarding your department revealing information that they gave you? A. Yes, sir.

Q. Will you state when that took place as near as you can, Mr. Schlick? A. The date will have to be established as being an approximation. As has

been previously testified when the investigation continued over a period of time conversations are had at various intervals and as to segregate any particular conversation with reference to any particular date, it is physically impossible. I would say that as near as I can recall that particular conversation was in the latter part of August or the first part of September of 1945.

Q. And that was at the plant of the Shubins?

A. Yes, sir.

Q. Will you state what you said and what they said as near as you can? A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the OPA officials.

We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department." [R. 451-452.]

James Eustice, one of the agents present at the time the appellants' statements were taken down, and who testified to subsequent interviews that he had with the appellants, was asked on *voir dire* if he had told appellants that their statements to him might be used against them. His answer was: "I didn't warn them at any time." [R. 358.]

The court then denied appellants' motion to strike the testimony of Eustice upon the assurance of government counsel that he would show that appellants were so cautioned. [R. 358-359.]

The witness Bircher did testify that he cautioned them as to the possibility of their statements being used against them, but he does not deny the testimony of Joseph Brady that there was an understanding that the statements would be solely for the eyes of the Internal Revenue Department. In fact, he admits that before the appellants gave their respective statements there was a discussion off the record. [R. 375.]

The situation can be summarized as follows:

(1) A waiver of the requirements of the treasury regulations in obtaining and using tax returns would have to be explicit.

(2) Such waiver is not presumed but the burden is upon the government to show it by clear evidence.

(3) There is no such evidence of waiver.

POINT FIVE.

The District Court Erred in Denying Appellants' Motion to Quash the Indictment and in Refusing to Permit an Inquiry into the Use of Inadmissible Evidence Before the Grand Jury and in the Preparation of the Government's Case.

After the District Court had refused to receive the written statements [Government's Exhibits Numbers 50, 51 and 52 for Identification] in evidence, appellants' counsel moved to dismiss the indictment on the ground that this unlawfully-obtained evidence had been used in the preparation of the government's case and in procuring the indictment. [R. 385-397.]

This motion was denied and appellants' counsel was denied the opportunity to inquire into the extent that this evidence was used before the grand jury. [R. 397.]

The evidence showed that during the course of the grand jury investigation in September, 1945, government counsel in Los Angeles requested the Attorney General in Washington to obtain from the Commissioner of Internal Revenue certain tax returns of designated individuals and corporations. This request did not mention any of appellants but it did mention the name of a partnership under which they did business, by the name of Vernon Hotel & Restaurant Supply Co.

As its proof that the Government had followed the procedure prescribed by the Treasury Regulations, its counsel introduced three letters, all of which are marked Government's Exhibit 55. [R. 294-298.] The first was

a letter dated September 27, 1945 which we quote as follows:

“WS/BVB

September 27, 1945

The Attorney General
Department of Justice
Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2
Central Packing Company
Vernon Hotel & Restaurant Supply Co.
Hyman Stillman
Lou Segal or Siegal, and others
Your Reference: . . .

Sir:

In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

We are now in the process of conducting a Grand Jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigation.

Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal Revenue Agent J. Bryant Eustice to testify on the trial of the above-entitled case, and to furnish such

information and documents as are in their possession, pertinent to said case?

Respectfully,

CHARLES H. CARR,
United States Attorney."

[R. 294-295.]

It will be noted that the letter does not refer to any of these three appellants.

The second letter was from the Attorney General's office in Washington to the United States Attorney in Los Angeles, stating that the request had been made to the Commissioner and that he had granted such request. Here again this letter fails to mention any of these three appellants. [R. 295-296.]

The third letter was a copy of the Commissioner's consent, which we quote as follows:

"Oct. 5, 1945

"Hon. Theron L. Caudle,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2,
Central Packing Company,
Vernon Hotel & Restaurant Supply Co.,
Hyman Stillman,
Lou Segal or Siegal, and others.
(Emergency Price Control Act.)

Dear Mr. Caudle:

Reference is made to your letter dated October 4, 1945, enclosing a copy of a letter dated September

27, 1945, from the United States Attorney for the Southern District of California. In his letter the United States Attorney states that a grand jury investigation is being conducted with a view to ascertaining whether any of the above-named taxpayers have violated the Emergency Price Control Act. The United States Attorney also states that certain investigating agents of the Bureau while making an income tax investigation have obtained certain information that will be pertinent in any trial of the taxpayers arising from their indictment for violations of the Emergency Price Control Act. The United States Attorney requests that you secure authority for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the cases and to furnish such information and documents as are in their possession pertinent to said cases. In your letter you request that the Bureau cooperate with the United States Attorney.

In accordance with your request authority will be given the special agents and the revenue agent to furnish the United States Attorney such information and documents as may be in their possession regarding the violations of the Emergency Price Control Act by the above-named taxpayers, and, upon proper subpoena, to testify at grand jury proceedings and at the trial of the taxpayers in the event that they are indicted for violations of that Act.

Very truly yours,

(Signed) W. T. SHERWOOD,
Acting Commissioner."

[R. 296-298.]

Here again no mention was made of any of the appellants. It clearly appears from these communications that it was the intent of the United States Attorney to use the internal revenue agents and the information he obtained from them before the grand jury.

The above are the only letters produced by the government purporting to comply with the Treasury Regulations. Government counsel immediately obtained all the information from the witnesses Bircher and Phoebus as to appellants' amended returns, including the individual statements of each of the three appellants [Government's Exhibits 50, 51 and 52 for Identification], which the District Court held to be inadmissible because not covered in the request to the Commissioner of Internal Revenue. [R. 299-309.]

The following portions of the record show that there was ample justification for the appellants' contention that the indictment was procured by the use of this improperly obtained evidence:

"Mr. McLaughlin: Well, your Honor, I think that in the discussion yesterday, Mr. Strong in discussing those three statements which he sought to introduce into evidence, at the time the Grand Jury began to deliberate, he said, we did not know the names of all these parties at that time; and, he said, that is why we did not put them down. I assume that he, in writing for those things last fall, if he did, wrote for them for use in connection with the Grand Jury.

The Court: The record now shows, unless you have something different, that that is not correct.

Mr. Strong: May I say something? I do not see what the letters which we wrote have to do with this Grand jury altogether.

The Court: Well, I want Mr. McLaughlin to make his record.

Mr. Strong: Yes.

The Court: Because the defense are entitled to that.

Mr. Strong: I have no recollection of any of these documents being used before the Grand Jury; and I can say that, as far as I remember, none of these letters were used before the Grand Jury and I do not remember of any statements being used.

The Court: All right.

Mr. McLaughlin: Mr. Strong, when you say you do not remember any statements being used before the Grand Jury, do you include in that those three statements?

Mr. Strong: Those are the ones I am talking about. I am talking about those three statements.

The Court: 50, 51, and 52?

Mr. Strong: Yes.

Mr. McLaughlin: And they were not so read or exhibited?

Mr. Strong: I do not recall their being read at all at any time.

The Court: Unless the defense counsel has some evidence to the contrary, I suppose that must be accepted by the court.

Mr. McLaughlin: I think that is right, your Honor.

The Court: That would be true on that point. Have you some other point, Mr. McLaughlin?

Mr. McLaughlin: Well, it is tied in with this, although a distinctly different point. I am going to make it now, as long as we have some time.

The motion which I was going to make was that evidence which had been illegally obtained was used before the Grand Jury. Mr. Strong states to the court it was not; so, on his statement, we accept that.

The other motion that I was going to make was that there was not sufficient evidence offered before the Grand Jury to show the commission of a crime.

Now, there again, I will be very frank with the court, and I was going to premise that motion on the same contention and I realize that your Honor has discretion in inquiring into whether there was sufficient evidence or not; and I think that any objection I might advance, in view of the fact that letters were written last fall when this investigation was under way, and that at least the United States Attorney had them in his possession, that I should request permission to have the transcript examined and the minutes examined to see whether there was evidence of a crime as shown in the indictment." [R. 385-387.]

Thereupon the court's attention was directed to the letter of the United States Attorney [Government's Exhibit 55] wherein it was stated that the purpose of the information requested was for the use in the grand jury

investigation then under way. The appellant's attorney then continued his statement to the District Court as follows:

"Now, the intention apparently was to use those things and quite obviously, and there again I have to guess because I wasn't there, but quite obviously he is there asking to use Internal Revenue Agent J. Bryant Eustice and D. O. Bircher and that those men in testifying would have used those statements to refresh their recollection, and the whole thing comes down to the point that I want to argue in this case that even if they weren't actually introduced before the grand jury they were obtained by the United States Attorney and the United States Attorney procured them from the Internal Revenue Department to come into court and testify to matters which were also set forth in those things if they did not exhibit them to the grand jury and I submit that the material contained in those is confidential and that the United States Attorney unlawfully obtained it for purposes in connection not only with the grand jury but also in connection with the investigation.

The code section which is involved in this case makes a specific provision against the use of income tax returns for any purpose except as authorized by regulations. Now, there must have been reason for adopting that code section and the only policy reason that I can see for adopting that code section and the only policy reason that I can see for adopting such a regulation was to afford some protection to taxpayers who are required in their returns to set

forth the facts as to where they got their income and so forth. The government is interested in collecting taxes and it wants to afford a certain amount of confidence or privacy to persons who are truthful enough to submit their returns honestly and who may have obtained income in some manner that may or may not violate the law.

The government collects that money as income and it rightly should and in order to encourage people to make accurate returns and not be jeopardized by criminal prosecution, I think that statute was enacted for that purpose.

Now, the regulation goes along and it does not say that the Commissioner shall in all instances furnish it to the government. It states some conditions there and as your Honor observed yesterday it shows that there is some discretion which must be exercised. Otherwise there would be no purpose for any regulation. The statute might just as well have read and said and the regulation too that whenever anybody in the government wants a copy they shall have it, but it did not say that and I submit therefore that this is a very important statute and if it is to be just slid over and disregarded in all these matters that it is being nullified, and I submit that when the United States Attorney obtains one of those returns in violation of the statute or not in compliance with the statute and rules and regulations and uses it in connection with getting information for an indictment and perhaps for use, according to this letter he certainly intended to use the two agents out here

whom he mentioned and any documents that they have in their charge, and I submit that they have violated the laws of this country with respect to search and seizure and that the indictment for that reason should be quashed.” [R. 389-390.]

The court in denying the appellants’ motion was apparently motivated by the statement of Mr. Strong that he had no recollection of using these documents before the grand jury. Its ruling was as follows:

“The Court: In view of the statement of the government the motion to quash will be denied and exception allowed the defendants. The motion to dismiss will be denied and exception allowed the defendants.” [R. 397.]

Mr. Strong did admit that he had studied and discussed these statements during the course of the grand jury investigation. If he did not actually present them to the grand jury, it must have been because the oral testimony of the witnesses Bircher and Eustice accomplished the same purpose. We have already quoted the Treasury Regulation showing the same restrictions upon the use of such oral testimony as those applying to documents in the possession of the Internal Revenue Department.

When Mr. Strong was called as a witness by appellants’ counsel, he admitted that he received these three documents from the Internal Revenue agents shortly after

the letter of authority came from the Commissioner. He did not remember using them before the grand jury, but he said, "They are very important documents to us." [R. 456.]

On objection of government counsel, the court refused to permit further questioning of Mr. Strong, thereby denying appellants the opportunity to show the extent to which information obtained from the internal revenue department had been used. [R. 458-459.]

If evidence is improper at a trial, it is likewise prejudicial to use it in procuring the indictment or in preparing the government's case. If authorities were needed to sustain this obvious principle, the cases which we cited under the previous subdivision of this brief clearly sustain it.

In concluding this subdivision, we submit that the District Court should have permitted a full inquiry into these matters and if it appeared that improper evidence was used before the grand jury it should have granted appellants' motion to dismiss.

See:

United States v. Alper, (2nd Cir.), 156 F. (2d) 222 at 226;

United States ex rel Potts v. Robb, (3rd Cir.), 141 F. (2d) 25; and

Rules 6(e) and 12 of Federal Rules of Criminal procedure.

POINT SIX.

The District Court Erred in Admitting Into Evidence an Accountant's Statement Prepared Under the Supervision of Appellants' Tax Counsel and Delivered By Him to Agents of the Department of Internal Revenue.

The witness Bircher identified an accountant's statement prepared under the supervision of appellants' tax attorneys which is an analysis of the overcharges received by appellants and which was equally as prejudicial as the transcribed statements of appellants previously discussed herein. The court received it in evidence [Government's Exhibit 58] over objection both that it had not been procured pursuant to the procedure prescribed by the Treasury Regulations above discussed, and also on the further ground that it was a privileged communication within the definition of Section 1881 of the California Code of Civil Procedure.

Subdivision 2 of that section provides:

"Attorney and client. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

There was no evidence that either appellants William Shubin or Frederick Shubin had authorized its delivery or disclosure to the Internal Revenue agents and neither of them were present at the time their tax counsel delivered it. [R. 405-407.]

The record of the objections and ruling of the court on this is as follows:

"Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another document which comes within the category of the supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness—I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's records at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even if his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present, but not the two Shubins. They were not present when this was delivered.

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed." [R. 405-407.]

The above mentioned section on privilege governs trials in the United States District Courts.

See:

Doll v. Equitable Life Assurance Society, 138 Fed. 705; and

Metzler v. United States, 64 F. (2d) 203.

POINT SEVEN.

Appellants' Respective Admissions to the Internal Revenue Agents Constitute the Only Evidence of a Conspiracy and Not Being Made in Furtherance of the Conspiracy They Are Insufficient.

Even though we ignore the points heretofore made against the admissibility of the appellants' statements to the internal revenue agents, such statements were still insufficient to establish a *prima facie* case of conspiracy.

The rule is well established that statements of a conspirator not made in furtherance of the conspiracy are insufficient proof standing alone.

In *Dowdy v. United States* (4th Cir.), 46 F. (2d) 417, the court had before it the admissibility of a confession made by one of the co-conspirators to the officers and in holding the same to be inadmissible, it said at page 425:

"It is well settled that before such a statement or declaration is admissible, it must not only be made during the continuance of the conspiracy, *but it must be made in furtherance of it*. These statements were nothing more than a confession by Martin implicating Funk, and all the authorities hold that they are inadmissible, except as against the party making them. Upon that point, we think the decision of this court in a very similar case is conclusive. *Hauger v. U. S.* (C. C. A. 4th), 173 F. 54." (Italics ours.)

In *Hauger v. United States* (4th Cir.), 173 Fed. 54, the court had before it the admissibility of a confession obtained from one of the conspirators, and in holding the same inadmissible the court said at page 57:

"It is not necessary, however, to discuss this proposition. The point which we shall consider is whether,

under the circumstances, the alleged confession of Menear to Washer was admissible as the declarations of a co-conspirator. It is a well-settled principle of evidence that in a trial on an indictment for conspiracy after the unlawful agreement has been shown the acts and declarations of co-conspirators are admissible as a part of the *res gestae*. By the act of conspiring together the conspirators have jointly assumed to themselves as a body the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is said or done by any one in furtherance of that design a part of the *res gestae*, and therefore the act of all. For these reasons *the conspiracy must be proved prima facie or such acts, and declarations are inadmissible*. 3 Greenleaf on Evidence (16th Ed.), Sec. 94, note 1. In this case there was an entire absence of evidence to prove the unlawful combination between Menear and the defendant. It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1905, he, Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coin. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged co-conspirator, given secondhanded, admissible to prove the existence of the conspiracy. Such declarations are made competent only after the conspiracy has been shown to exist." (Italics ours.)

See, also:

Vogt v. United States (5th Cir.), 156 F. (2d) 308 at 310; and

Yost v. United States (4th Cir.), 157 F. (2d) 147 at 150.

If we eliminate the testimony of the internal revenue agents concerning the respective admissions of appellants,

there is no other evidence to prove the conspiracy. The testimony of the three meat purchasers, Dvorak, Snider and Veuhoff, shows no conspiracy among the appellants. It shows absolutely nothing as to Frederick Shubin, and as to William Shubin and Jack Kissel it shows no more than the payment to one or the other of them of moneys in excess of ceiling. Overt acts are only admissible to prove a conspiracy in instances where two or more of the conspirators have jointly committed such overt acts in such manner as to show that it was pursuant to an arrangement between them.

In *Stack v. United States* (9th Cir., 1928), 27 F. (2d) 16, the opinion typifies the type of overt acts which might be considered in determining whether a conspiracy was formed. In that case the government agent had purchased liquor from one of the defendants at the restaurant and saw him put the money in the cash register. He subsequently saw two other agents go in and purchase liquor in the same restaurant from two other employees or operators. In holding that such acts might be sufficient to show a conspiracy the court said at page 17:

“Said the court in *Fisher v. United States* (C. C. A.), 2 F. (2d) 843, 846: ‘The fact that two men are found together breaking into a bank is indubitable proof that they had agreed to commit the burglary.’ It is sufficient if the evidence shows such a concerted action in the commission of an unlawful act, or other facts and circumstances from which the inference naturally arises that the unlawful overt act was in furtherance of a common design, intent and purpose of the alleged conspirators. *Calcutt v. Gerig* (C. C. A.), 271 F. 220, 27 A. L. R. 543; *Davidson v. United States* (C. C. A.), 274 F. 285; *Keith v. United States* (C. C. A.), 11 F. (2d) 933.”

Conclusion.

A brief summary of the infirmities in the government's case will demonstrate the collective prejudice suffered by the appellants at the trial.

In the first place, the government had no right to use the internal revenue records and testimony of its agents as it did not follow the procedure prescribed by the Treasury Regulations. There is no evidence of a request made to the Commissioner of Internal Revenue for the records pertaining to the individual appellants.

If these regulations are to have any meaning and purpose they should be complied with. The situation is no different than if the government counsel had gone directly to the internal revenue agents and obtained such records and testimony without even pretending to comply with the Treasury Regulations. Evidence not legally or properly obtained cannot be used by the government.

In the second place, the evidence produced from the internal revenue agents, being solely as to individual confessions of appellants, is not sufficient *prima facie* evidence of a conspiracy and there is no other evidence of any concerted unlawful acts of appellants, or of a conspiracy.

In the third place, the evidence of the three buyer witnesses to prove the specific misdemeanor counts is too vague and uncertain to sustain a conviction.

Any one of the foregoing or any of the other points dealt with in this brief is sufficient alone to cause a reversal. The combined prejudice which these errors caused

naturally presents a stronger case for invoking the doctrine of the following authorities:

Bollenbach v. United States, 90 L. Ed. 318, 66 Sup. Ct. Rep. 403;

Glasser v. United States, 315 U. S. 60, 80 L. Ed. 680 at 698;

Bruno v. United States, 308 U. S. 287, 84 L. Ed. 257 at 261;

Vierick v. United States, 318 U. S. 236, 85 L. Ed. 735;

New York C. R. Co. v. Johnson, 279 U. S. 310, 73 L. Ed. 706;

U. S. v. River Rouge Imp. Co., 269 U. S. 411, 70 L. Ed. 339; and

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314.

Respectfully submitted,

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No. 11382

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,

United States Attorney; **FILED** **SEP 11 1947**

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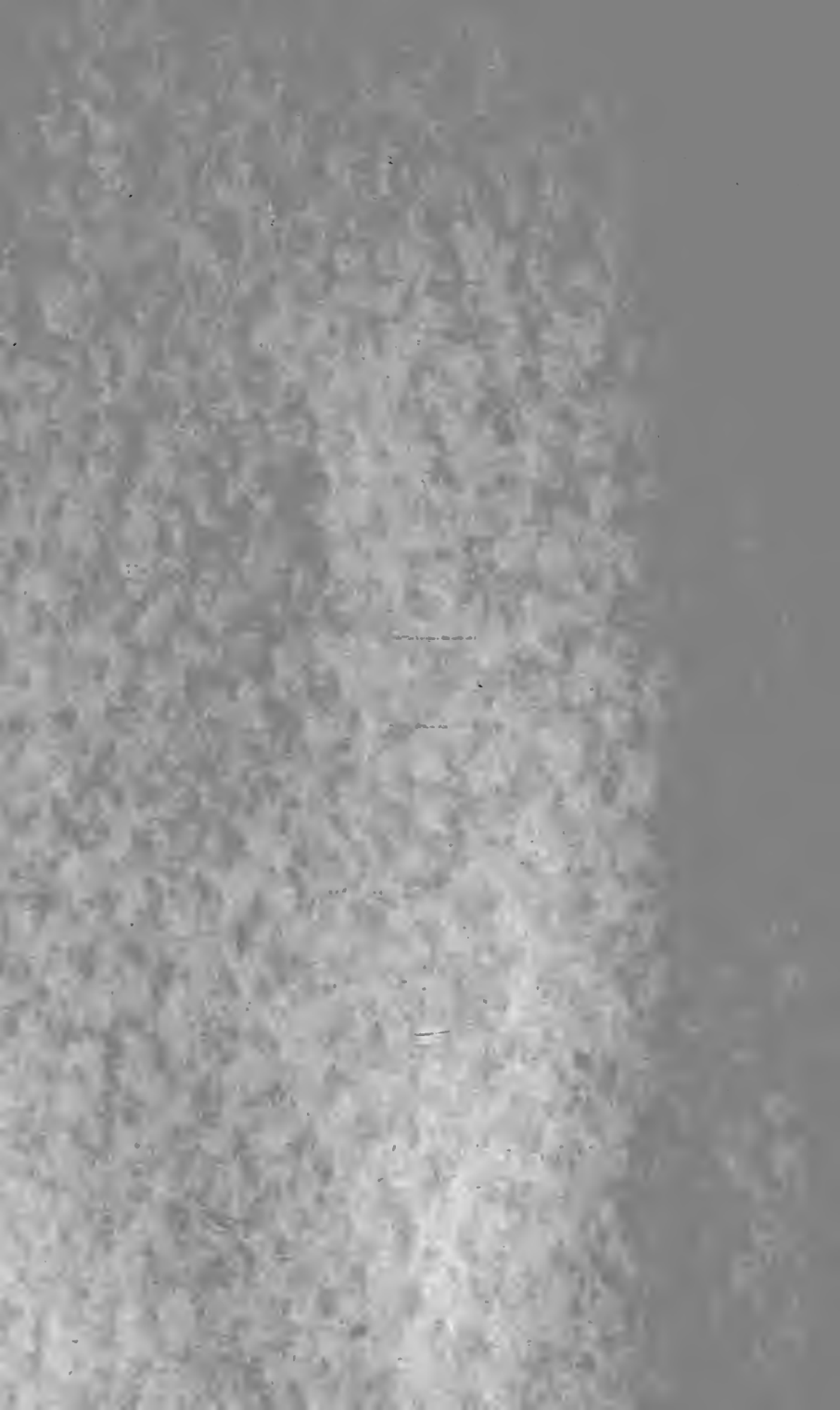
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No. 11382

IN THE

United States Circuit Court of Appeals
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JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

Appellants were indicted under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901 *et seq.*), and the regulations promulgated under that Act, as well as Section 37 of the Criminal Code (18 U. S. C. §88). The District Court had jurisdiction under Sections 24 and 340 of the Judicial Code (28 U. S. C. 41(2) and 18 U. S. C. 546) and Section 205(c) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925(c)). The offenses charged were committed in the Southern District of California [R. 3 ff.].¹ Judgments were entered on July 5, 1946 [R. 56-63]. Notice of appeal filed on July 9, 1946 [R. 64-65]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹References herein preceded by "R" are to the printed record on appeal, while the references preceded by "A. B." are to the appellants' brief.

Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

“It shall be unlawful, regardless of any contract, agreement . . . or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, . . . or otherwise do or omit to do any act, in violation of any regulation or order . . . of any price schedule effective in accordance with the provisions of this Act.”

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 922(b)) provides as follows:

“The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, . . . to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents,”

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925) provides in part as follows:

“Enforcement.

* * * * *

“(b) Any person who willfully violates any provision of section 4 of this Act [section 904 of this Ap-

pendix], and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than . . . one year . . . or to both such fine and imprisonment. . . .”

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to specific products of the type involved in this case. These Regulations, in so far as they apply to this case, are set forth in the Appendix to this brief.

Statement of the Case.

On March 11, 1946, the appellants were indicted in the United States District Court for the Southern District of California, Central Division, in 40 counts. Count 1 alleged that the appellants conspired, in violation of 18 U. S. C. §88, to commit certain acts prohibited by the Emergency Price Control Act of 1942, and Maximum Price Regulations 148, 169 and 239, issued under that Act [R. 3-8]. Counts 2 to 15, inclusive, and 23 to 33, inclusive, each in substance charged that the appellants made a sale of certain, specified meat items for a price per pound in excess of the maximum price permitted by the Emergency Price Control Act of 1942, and the Regulations issued under it [R. 9-18, incl., 23, 33]. Counts 16 to 22, inclusive, charged that appellants made a false entry in a document required to be kept under the provisions of the

Emergency Price Control Act, and the Regulations² [R. 18-23, incl.].

On March 30, 1946, appellants filed a motion for a bill of particulars [R. 30-36] and on April 1, 1946, filed a motion to dismiss the indictment on various grounds [R. 37]. Both motions were denied on April 1, 1946 [R. 38]. Thereupon, the appellants, also on April 1, 1946, each entered pleas of not guilty to each count of the indictment [R. 38]. Beginning on June 18, 1946, a trial was had before the Honorable Judge J. F. T. O'Connor and a jury [R. 78-590].

At the conclusion of the Government's case, appellants made motions to strike the testimony of certain Government witnesses [R. 439], and for judgments of acquittal as to all the counts [R. 440-443], all of which were denied [R. *ibid.*].

The appellants themselves did not testify at the trial but they introduced certain evidence on their own behalf, and thereafter renewed their motions for acquittal [R. 447-469] and to strike certain evidence [R. 471]. These motions were again denied [R. 472].

The jury found appellants *Kissel* and *William Shubin* guilty as charged in counts 1 to 11, 16 to 18, 20 to 25 and 30 to 33, inclusive [R. 580-588], and found appellant *Frederick A. Shubin* guilty as charged in counts 1, 16 to 18, 20 to 22, inclusive [R. 580-586].

²The Government ultimately dismissed Counts 12-15, inclusive; 19; 26-29, inclusive, and 34-40, inclusive, prior to submission of the case to the jury.

Statement of Facts.³

In our "Statement of Facts" we shall set forth the evidence most favorable to the Government; and in our argument below (pp. 23 ff) we shall collect such evidence as to the appellants, in demonstration of the correctness of the jury's verdicts and the adequacy of the evidence supporting the verdict.

At the outset it should be noted that the evidence which was before the judge and the jury in this case falls into three main categories: (a) documents constituting the written record of the transaction and consisting of invoices and other documents for each count, (b) testimony of witnesses as to particular transactions set forth in the various counts of the indictment, and (c) testimony of witnesses as to statements to them by appellants as to their activities.

Summary.

In brief, the record shows, entirely without contradiction or dispute, that appellants, engaged in the sale of meat at wholesale, sold meat at prices in excess of those permitted by law and failed to record upon their books and records the true price collected by them, showing only the legitimate portion of the price paid, concealing the over-ceiling part. In order to avoid disclosing to the Office of

³Appellants have sporadically inserted in various parts of their opening brief various carefully selected and edited excerpts from the testimony of witnesses, as well as certain other so-called factual material. Appellants have completely failed to set forth before this Court the evidence most favorable to the Government upon which alone the sufficiency of the evidence in this case, as to each of the appellants, is to be tested. See, *e. g.*, *Hemphill v. United States*, 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627.

Price Administration these illegal operations and collections, appellants also falsified their income tax returns. To further conceal from the O. P. A. the true collections made by them in sales of meat—a fact which they were specifically required by O. P. A. regulations (see Appendix, *infra*) to show truthfully on their records—appellants evolved a scheme whereby they would continue the false entries on their records but would seek to make known “confidentially” to the Bureau of Internal Revenue the true facts.

Statement of Facts.

In general, the evidence disclosed that on about November 16, 1942, appellants entered into a partnership under the name of Vernon Hotel and Restaurant Supply Company, which was, at all times material to this case, engaged, as were each of the appellants individually, in the sale of meat at wholesale in Los Angeles [R. 90, 476-477].

From at least November 16, 1942, to December 31, 1944, the appellants systematically collected from their meat customers cash charges over and above the maximum ceiling price permitted by the Act and the Regulations, on the sale of meat to such customers by the appellant [R. 401]. Invoices issued for each sale carried the ceiling price as the price paid; in addition, an overceiling charge was collected in cash. The appellants had the customers “educated” to the payment of such overcharges [R. 402] to such an extent that appellants only had to advise the customers of the lump sum for overcharges which was owed by them to the appellants in order to receive that money. These overcharges were computed and paid on a basis of so much per pound [R. 402].

More particularly, the evidence in this respect showed that:

Emil J. Dvorak,^{3a} who operated a retail meat business, beginning in November, 1942, and thereafter, made purchases of meat from the appellants at their Vernon Hotel and Restaurant Supply Company [R. 89, 90, 180], which had just been organized [R. 94, 95, 96].⁴

Dvorak was given an invoice for each such transaction [R. 92, 98]; he always called for the meat with his own truck [R. 90, 131].

In about November, 1942, appellant William Shubin had discussed with Dvorak the subject of Dvorak's paying over the ceiling price for meat purchased by him from appellants [R. 93, 96]. Dvorak was having difficulty obtaining meat from other wholesalers [R. 185]. William Shubin told Dvorak “* * * if you want to stay in business you got to play ball” [R. 97, 185].⁵

Thereafter, Dvorak was required to pay to the appellants a “set” overceiling sum in buying meat from them [R. 185-186, 191]. Appellants had “come to some set figure that I [Dvorak] had to pay” in excess of the ceiling price [R. 186-187], and Dvorak was informed by appel-

^{3a}Dvorak's testimony is uncontradicted.

⁴Appellant's counsel stipulated that their partnership was formed on November 16, 1942. Prior to that time Dvorak had been making meat purchases from the predecessor concern of the Vernon Hotel and Restaurant Supply Company, which was operated as a partnership by appellant William Shubin and another [R. 90-91].

⁵Dvorak referred to appellant William Shubin as “Bill”, appellant Jack Kissel as “Jack”, and appellant Frederick Alexander Shubin as “Fred” [R. 90, 106-107, 164].

lants that he would be required to pay over the ceiling [R. 187, 189].

On about January 4, 1944, Dvorak purchased certain meat items from the Vernon Hotel and Restaurant Supply Company, in connection with which he received that company's invoice No. 39251 [R. 92, 99-101, 102]. Among the items embraced by that invoice were 126 pounds of short cut pork loins and 125 pounds of pork shoulders, New York [R. 102, 104].⁶ The price per pound shown on the invoice for each of these items was the maximum price which appellants were permitted to charge under the Emergency Price Control Act and Maximum Price Regulations issued under it.⁷

Dvorak paid the invoiced price to a clerical employee at the Vernon Hotel and Restaurant Supply Company [R. 102, 104-105, 109]. In addition to that price, Dvorak then immediately paid an additional sum about five and three cents a pound⁸ in cash on the items to appellant Kissel or William Shubin, who had computed the over-ceiling sum due them on a machine [R. 104, 105, 107, 108, 109, 110, 111, 171, 200].⁹ Dvorak received no receipt for this extra sum [R. 110].

⁶Meat items are designated on this invoice, as well as on all others, by hieroglyphics known to the meat trade, and translated by witnesses [See, *e. g.*, R. 93, 103, 104, 141].

⁷At the trial it was stipulated by counsel for appellants *that* in each instance the price shown on the invoice was the maximum ceiling price [R. 103, 104, 135-136, 149, 158-159, 179, 249].

⁸The overceiling sum per pound paid by Dvorak to appellants varied from time to time [R. 108, 109].

⁹ This transaction is charged in Count 2 of the Indictment.

Moreover, he accepted the overceiling figure demanded because “* * * at that time I knew how much I was paying and I naturally figured whether they were overcharging me more than they should or not” [R. 110].

The testimony of Dvorak was not contradicted; neither of the appellants testified at the trial.

On various subsequent occasions Dvorak bought meat from the Vernon Hotel and Restaurant Supply Company, paying in each instance an overceiling sum to either Kissel or William Shubin [R. 101, 131-132, 144, 181]. In each instance Dvorak received an invoice, which is in evidence, which bears a number and shows the date of the purchase, the meat items sold to Dvorak, the ceiling price for each item, the total legal price for the entire transaction, and, in most instances, a notation showing that the invoiced amount was paid. As to each such invoice Dvorak paid the invoiced sum to the cashier. In addition Dvorak paid in cash to either Kissel or William Shubin an extra sum of money, computed at different rates running from three to eight cents a pound, over the legal ceiling price.

To save the time of this Court, we have summarized Dvorak's testimony and the exhibits in table form:

AMOUNT	INVOICE No.	DATE	OVERCEILING SUM		OVERCEILING SUM PAID TO	
No. 3	39609 [R. 138]	1/21/44	234	lbs. at 5¢ lb. over [R. 136-137]	Kissel or W. Sh [R. 136-137]	
4	41736 [R. 140]	7/19/44	100 85 98	lbs. at 3¢ lb. over " " 5¢ " " " " 5¢ " " [R. 139]	Kissel or Wm. Sh [R. 139]	
5	42076 [R. 142]	8/ 4/44	136 157 103½	lbs. at 5¢ lb. " " " 3¢ " " " " 5¢ lb. " [R. 141-142]	Kissel or W. Sh [R. 141-142]	
6	13563 [R. 145]	9/21/45	100 155	lbs. at 5¢ lb. " " " 3¢ lb. " [R. 144]	Kissel or W. Sh [R. 144]	
7	16645 [R. 148]	12/12/45	182 138 137 189 115	lbs. at 3¢ lb. " " " 5¢ " " " " 5¢ " " " " 5¢ " " " " 5¢ " " [R. 146-147]	Kissel or W. Sh [R. 146-147]	
8	44072 [R. 151]	10/25/44	200	lbs. at 5¢ lb. " [R. 150]	Kissel [R. 150]	
9	13357 [R. 152]	9/17/45	293 191	lbs. at 5¢ lb. " lbs. at 3¢ lb. " [R. 152]	Kissel or W. Sh [R. 151]	
16	14649 [R. 154]	10/22/45	800	lbs. at 7¢ lb. " [R. 153-154]	Kissel or W. Sh [R. 153]	
17	3729 [R. 156]	5/8/45	111 79 68 43	lbs. at 3¢ lb. " " " 7¢ " " " " 5¢ " " " " 7¢ " "	Kissel or W. Sh [R. 155]	

NT	INVOICE No.	DATE	OVERCEILING SUM		OVERCEILING SUM PAID TO	
8	3327 [R. 158]	6/18/46	123	lbs. at 3¢ lb.	"	Kissel or W. Shubin
			110	lbs. at 5¢ lb.	"	[R. 157]
				[R. 157]		
20	15584 [R. 160]	11/15/45	193	lbs at 5¢ lb.	"	Kissel or W. Shubin
			102	" " " "	"	[R. 159]
			580	" " 3¢ "	"	
			96	" " 5¢ "	"	
			131	" " 3¢ "	"	
			138	" " 5¢ "	"	
				[R. 159]		
1	45741 [R. 161]	12/26/44	289	lbs. at 3¢ lb.	"	Kissel or W. Shubin
			257	" " 5¢ "	"	[R. 161]
			72	" " " "	"	
			96	" " " "	"	
				[R. 161]		
2	4437 [R. 163]	6/7/45	580	lbs. at 5¢ lb.	"	Kissel or W. Shubin
			163	" " " "	"	[R. 162]
			150	" " 3¢ "	"	
			232	" " 5¢ "	"	
			282	" " 5¢ "	"	
				[R. 163]		
1(r)	44235 [R. 172]	10/31/44	134	lbs. at 5¢ lb.	"	Kissel or W. Shubin
			129	" " 3¢ "	"	[R. 170]
				[R. 169]		
1(t)	5252 [R. 175]	7/10/45	172	lbs. at 7¢ lb.	"	Kissel or W. Shubin
			210	" " 7¢ "	"	[R. 174]
				[R. 174]		
1(s)	5128 [R. 178]	12/ 4/44	172	lbs. at 3¢ lb.	"	Kissel or W. Shubin
			150	" " 5¢ "	"	[R. 177]
			64	" " 7¢ lb.	"	
			37	" " 7¢ "	"	
				[R. 177]		

George Veuhoff¹⁰ had a retail meat market, known as "George's Market," between January 1 and the end of March, 1945 [R. 201, 202, 203]. During that period he purchased meat for his market from the appellants' Vernon Hotel and Restaurant Supply Company [R. 203]. Vieuhoff always picked up the meat at the company's plant [R. 222].

About "the first of the year in '45" [R. 222], Veuhoff had a conversation with appellant Kissel at appellants' plant, with regard to paying above the ceiling price [R. 222]. Kissel told Veuhoff that he would be required to pay an overceiling sum of about ten cents a pound on bacon and ham, three or four cents a pound on beef, and eight or ten cents a pound on pork loins [R. 223, 224].

On March 20, 1945, Veuhoff purchased 176 pounds of grade B veal from the Vernon Hotel and Restaurant Supply Company, and in connection with that transaction received their invoice No. 48245 [R. 203, 207]. He paid the invoiced price of \$36.96, at the rate of 21¢ a pound, the ceiling price, to a clerical employee [R. 204].

In addition to the ceiling price, Veuhoff paid to William Shubin or Kissel the overceiling sum of seven cents (7¢) per pound in cash, making an added sum of \$12.32 [R. 204].¹¹

On this occasion, as well as on all others when Veuhoff bought meat from the appellants, the procedure followed was this, in Veuhoff's words:

"I would get my meat and put it in the truck and then go in and get the bill and pay the girl. * * *

¹⁰Veuhoff's testimony is uncontradicted.

¹¹This transaction is charged in Count 11.

Bill [Shubin] [R. 207] would add it on the adding machine and then give me the total of the overcharge," and Veuhoff would "pay him in cash" [R. 205].

Other purchases of meat by Veuhoff likewise included the payment of an overceiling sum by him to Kissel or William Shubin, as shown in summary form in the following table:

JNT	INVOICE No.	DATE	OVERCEILING SUM	OVERCEILING SUM
				PAID TO
30	47374 [R. 209]	2/14/45	1,085 lbs. at 3¾¢ lb. over [R. 207]	Kissel or W. Shubi [R. 208]
31	47348 [R. 213]	2/13/45	944 lbs. at 3¢ lb. " [R. 211, 212]	Kissel or W. Shubi [R. 211, 213]
32	46740 [R. 218]	1/26/45	558 lbs. at 10¢ lb. " [R. 215]	Kissel or W. Shubi [R. 216]
33	47034 [R. 220]	2/ 5/45	365 lbs. at 11¢ lb. " [R. 219, 221]	Kissel or W. Shubin [R. 219]

*In some instances Veuhoff recorded the overceiling payments on the reverse of the non Hotel and Restaurant Supply Company invoices [R. 209, 211, 214, 216] and showed such payments on his books [R. 210].

Austin T. Snyder¹² was in the retail meat business, operating as the "P & S Market" from 1937 until April, 1945, at which time he was drafted into the Army [R. 233].

During 1944 and 1945 Austin purchased meat from the appellants [R. 234].

On December 7, 1944, Austin bought from the appellants 256 pounds of hogs [R. 234, 239]. Austin called

¹²Snyder's testimony is uncontradicted.

for these hogs at appellants' plant [R. 234], and paid the invoiced, maximum legal price [R. 239] for the hogs to appellant Kissel [R. 238, 239].

In addition to the invoiced price, Austin paid to appellant Kissel the overceiling sum of eight cents per pound for the 256 pounds [R. 238].¹³

Austin made the following additional purchases of meat from the appellants, in each instance paying a cash sum in excess of the ceiling price:

AMOUNT	INVOICE No.	DATE	OVERCEILING SUM	OVERCEILING SUM PAID TO
No. 23	44976 [R. 241]	11/29/44	239 lbs. at 5¢ lb. over 309 lbs. at 8¢ lb. " [R. 240]	Kissel or W. Sh [R. 240]
No. 25	47882 [R. 243]	2/26/45	588 lbs. at 8¢ lb. " [R. 242]	Kissel or W. Sh [R. 242]
No. 10	47443 [R. 244]	2/16/45	836 lbs. at 3¢ lb. " [R. 243-244]	Kissel or W. Sh [R. 242]

When appellants first began collecting overceiling charges, they consulted their attorney "as to the proper method of recording the overcharges" so they could pay taxes on them [R. 402]. Their attorney advised them to report the overcharges, rejecting appellants' suggestion that they report them falsely as winning at gambling or horse races [R. 402-403].

Later, appellants' attorneys reported that they had "found a proper way to report" the overceiling sums for income tax purposes, without disclosing their illegal operations to the O. P. A. [R. 403]. Appellants' attorneys then

¹³This transaction is charged in Count 24.

retained other attorneys in this connection, and the latter originated the method of disclosure to Internal Revenue which was subsequently followed by appellants [R. 403].

This method included the filing of amended income tax returns for the period from November 16, 1942, to December 31, 1944 [R. 463, G. E. 35-49]. These returns disclosed a partnership income of \$141,125, not previously reported, and derived from overcharges in the sales of meat [R. 403, G. E. 35-49]. Also as a part of their method of disclosure to Internal Revenue (with continuing concealment as to the O. P. A.), appellants had a summary of their unreported illegal income prepared by a certified public accountant, and voluntarily furnished it to the Bureau of Internal Revenue [R. 403; see 408 ff.].¹⁴

In addition, on July 24, 1945, appellants William Shubin and Frederick Shubin voluntarily appeared with their attorneys at the Bureau of Internal Revenue in Los Angeles [R. 266, 267, 268, 280, 372, 374, 375, 463, 464-465], to offer facts in verification of their amended income tax returns previously filed [R. 266, 267, 374, 463].¹⁵

William Shubin appeared in the morning, and Frederick Shubin in the afternoon. Both Shubins were advised by Internal Revenue agents, in the presence of their attorneys, that they had the right to refuse to answer any question or to refuse to incriminate themselves, and that anything they said or any documents they furnished might be used against them [R. 268, 280, 372-373, 465]. Their

¹⁴The legal questions raised by appellants in this connection are discussed fully below.

¹⁵This investigation had no connection with the O. P. A. [R. 267-268, 279. Admittedly no subpoenas had been issued by the Bureau [R. 373, 465].

attorneys then, admittedly, advised them to answer [R. 465]. A verbatim transcript of all questions and answers was then made, and later examined by the Shubins [R. 268, 269, 280-284, 375] and their attorneys [R. 282, 375], and signed by the Shubins [R. 268, 280-284, 375].^{15a}

Appellant William Shubin at his conference stated^{15b} that the \$141,000 reported as additional income received by the partnership from November, 1942, to December 31, 1944, consisted of *overcharges collected by the partnership in the sale of meat in excess of the O. P. A. ceiling prices and in excess of the prices shown on the invoices* [R. 377-378, 380]. Shubin stated that he and each of the other two appellants usually collected the overcharges in cash, at the time each transaction occurred, and that the other appellants handed to William Shubin the overcharges collected by them [R. 378, 381]; that the overcharges were not shown on the invoices, only the ceiling price being stated upon them [R. 378, 380]; that the invoiced price was usually paid by check, while the overceiling amount was collected in cash, in secret in "the cooler or outside the vision of most of the employees around the office" [R. 379]; that Shubin kept a temporary record of overcharges due, destroying it when payment had been made [R. 380]; that he kept the overcharges cash in a drawer in the office, in his pocket, or at home where he hid it until needed [R. 380]; that he supplied his partners with money from

^{15a}Although rejected upon appellants' objection when offered in evidence by the Government, these statements were reproduced in the record on appeal upon designation for printing by appellants' counsel [R. 473 ff.].

^{15b}These facts were related by Special Agent Bircher of the Bureau of Internal Revenue, whose testimony is wholly uncontradicted and was not subjected to cross-examination.

this fund as needed by them and gave them occasional accountings of the funds [R. 380-381]; that they had about \$70,000 left in cash when they filed their supplemental income tax returns [R. 381].

William Shubin stated that he determined the rate of the overcharges [R. 382], saying to customers, "You owe me so much" [R. 402]. The customers did not have to be prompted to make their overceiling payments because William Shubin "had them trained" [R. 382] and "educated" [R. 403] so that if they wanted to obtain meat "they had to come forward" [R. 382].

No entries of the overceiling sums collected were made on the partnership records because appellants "did not want the O. P. A. to find such a record that they were overcharging" [R. 382].¹⁶

Each of the appellants shared equally in all profits of the partnership, including overceiling collections [R. 383].

On July 24, 1945, also, appellant Frederick Shubin, accompanied by appellants' attorneys [R. 416, 417], appeared voluntarily at the Bureau of Internal Revenue and, after warning as to his right not to answer or incriminate himself [R. 417], and upon the advice by his attorneys to answer questions [R. 417, 418], gave information as to the partnership income.

Appellant Frederick Shubin stated^{16a} that the partnership had collected overceiling charges in the sale of meat during 1942-1944 in the sum of about \$141,125 [R. 420]; that

¹⁶Some such collections were recorded under false sales invoices [R. 382-383, and 367-369].

^{16a}Agent Bircher's testimony as to this conference is uncontradicted and was not subjected to cross-examination [R. 431].

these overcharges were collected in cash, while the invoiced amounts showing the ceiling price were paid by check [R. 420, 423]; that he collected overceiling charges, as did appellants William Shubin and Kissel [R. 420, 422]; that overceiling sums were retained by William Shubin at his home [R. 420, 422]; that they did not tell their bookkeeper of the overceiling charges because they "did not want people to know they were in the black market" [R. 421], but that they finally made disclosures to their certified public accountant [R. 421].

Frederick Shubin stated that all three of the partners were to share equally in all profits of the partnership, including the overcharges [R. 421]. He stated that the reason appellants did not want those overcharges recorded on their books, was because they were conscious of the fact that O. P. A. rules permitted treble damage recovery for overcharges [R. 421]. He said that he had discussed the entire matter with their attorneys [R. 421]; that he had wanted to pay his taxes and report the profits, but that the partners did not know how to do so "without putting themselves liable to revocation of their license as wholesalers, meat wholesalers" [R. 422].

On August 1, 1945, appellant Jack Kissel, accompanied by appellants' attorneys, appeared at the Bureau of Internal Revenue, and voluntarily made various statements, after warning about self-incrimination [R. 404-405, 423-424; see also 427], and presented on behalf of the partnership the C. P. A. audit report prepared by appellants'

accountant on their behalf and at their request [R. 404-405, 408, 415, 427-8].

This report [R. 408-415] discloses that appellants collected \$141,125 in overceiling charges during 1942-1944 [R. 409]; that this sum was distributed among the three appellants [R. 409, 411]; that appellants entered part of their overceiling collections upon their "additions and withdrawals from investment" account [R. 419-410], part in their "Exchange Account" [R. 411]; that part of the overceiling sums went directly into each appellant's personal bank account [R. 412-413], part was spent by the individual appellant [R. 414]¹⁷ and part retained by one of them in cash [R. 414].

On August 1, 1947, also, Kissel, in the presence of his attorneys, stated that the \$141,125 represented "black market profits," overcharges collected in excess of O. P. A. ceiling prices by appellants in the sale of meat [R. 427]; that the \$141,125 shown by their C. P. A. report was money not recorded on the partnership books for the most part [R. 428]; that fictitious invoices were used "to plug in some of that money into the business" [R. 428]; that they wanted to pay taxes on their entire income but were "afraid they would lose their license if they showed those excess charges that had been collected" [R. 428]; that overcharges were collected by all of the appellants [R.

¹⁷The bank records are in evidence [R. 122, 166, 168, 432; Govt. Exhibits 1, 2, 3, 4, 19, 23, 24].

428], in cash, which was given to William Shubin [R. 428] who kept such funds at home [R. 428]; that he and Frederick Shubin trusted William Shubin to “make a fair distribution to them all” [R. 428].

In August and September, 1945, appellant William Shubin and the other appellant [R. 327] also admitted, often in the presence of each other [R. 317], that during the years 1942-1944 [R. 324, 331-334] a portion of the partnership's income came from “overcharges * * * charges made over the ceiling price paid in cash” [R. 325], while the balance of the income came from payments on invoices which billed meat at O. P. A. ceiling prices [R. 324-325]; that part of the cash derived from such overcharges was recorded on the partnership's books as “advances and withdrawals to capital” [R. 326, 336, 337]; that the overcharges recorded on the books as “advances and withdrawals to capital” were deposited to the partnership bank account [R. 327].¹⁸

William Shubin, in the presence of one or both of the other appellants, also admitted that the partners had used their “additions and withdrawals to capital” account on their partnership books to record the cash received from overcharges upon sales of meat [R. 336, 337]; that the money derived from overcharges was accumulated in cash

¹⁸All of the facts discussed here were furnished in the main by William Shubin at appellants' place of business. The other two appellants almost invariably referred all inquiries to him, and he often gave his answers in their presence [R. 327, 331, 333, 334, 335-336, 340, 341].

at appellant William Shubin's residence and was deposited to the partners' business bank account from time to time as required in their operations, and entered on their books as additions and withdrawals from capital (without disclosure of its source) [R. 337].

Appellant William Shubin made out numerous false invoices¹⁹ of the Vernon Hotel and Restaurant Supply Company purporting to show actual sales of meat; these invoices, however, were false, and were merely used by appellants to place upon the books of the partnership funds received from overcharges in other sales of meat by appellants [R. 365-369].²⁰

Appellants also told Agents Eustice and Phoebus that various specific identified sums which were deposited to their personal bank accounts or used by them in other ways were obtained as overcharges in the sale of meat [see, *e. g.*, as to *Kissel*—R. 345, 351-352, 359-360, 361; *William Shubin*—345-346, 354-356, 360-361; *Frederick Shubin*—345-346, 349, 352-353, 357-358, 359].

William Shubin and Frederick Shubin also told the investigators that a sum of \$46,000 shown under the "exchange account" on the partnership's books, was derived almost entirely from overcharges in the sale of meat [R. 353-354].

¹⁹A list of 92 is in the record [R. 367-369].

²⁰All of these facts as to the August conversations were testified to by Internal Revenue Agent Eustice. He was neither cross-examined as to any of them [R. 371] nor otherwise contradicted.

The appellants did not testify at the trial. Their defense witnesses were several Internal Revenue agents, who were questioned concerning the statements they had made to appellants *after appellants had voluntarily appeared before and given information to Internal Revenue agents as to their black market dealings*, as to the use to which appellants' admissions to them could be put [R. 447-452];²¹ the writer of this brief, Assistant U. S. Attorney William Strong, who was questioned concerning proceedings before the Grand Jury [R. 453-459]; and appellants' tax counsel, who had been an attorney for 26 years [R. 467] and who had appeared with them at the Bureau of Internal Revenue after appellant had voluntarily filed their amended returns under his supervision [R. 463].

Without a single denial as to any material fact, appellants rested their case [R 469].

²¹Appellants first appeared with their attorneys on July 24, 1947 [R. 372], and the conversations concerning which the agents were questioned, mentioned above, occurred in August, 1947 [R. 448, 45]. Even then appellants were in effect advised by these agents they could disclose appellants' statements upon authorization by the Treasury Department [R. 449-450, 452].

ARGUMENT

Appellants have placed before this Court five questions on appeal (A. B. 6, *ff.*),²² which they subdivide into seven separate points. We shall discuss these seven points *seriatim*.

Point One

(a) Appellants assert in effect (A. B. 9-12) that the trial court committed reversible error in overruling appellants' objections to the testimony of the retail meat dealers who testified that appellants collected overceiling charges from them. More specifically, appellants protest that none of these retailers could particularize exactly which appellant collected the overcharge, except in one instance, stating that one or another of appellants Kissel and William Shubin were the collectors. Consequently, appellants, further assert (A. B. 9) the evidence is insufficient to convict them. These contentions are without merit.

At the outset it should be noted that each count charges all three of the appellants with the commission of the same offense (R. 2, *ff.*). This is clearly proper. Manifestly, therefore, all of the appellants could have been found guilty as to each count. And appellants' contention that the testimony of these witnesses could not have justified a verdict against more than one of the appellants, and that the other appellants would necessarily have to be exonerated on each count (A. B. 12), is without basis in fact or law.

The evidence was patently relevant and material, and its admissibility was within the discretion of the trial

²²Reference preceded by "A. B." are to appellants' opening brief on appeal.

court. See, *e.g.*, *Moore v. United States*, 150 U. S. 57; *McCondless v. United States*, 298 U. S. 342; *United States v. Feldman*, 136 F. (2d) 394 (C. C. A. 2). See also *William H. Frederick, et al. v. United States*, decided July 18, 1947 (C. C. A. 9). And the issue is not one of admissibility, but rather one of legal weight and effect of the testimony admitted.

In this respect it is necessary to consider all of the evidence, not only the testimony of the retailers, in full, and the documentery evidence adduced through them.

Thus, the jury had before it not only the testimony of the retailers as to the overcharges (*supra*, pp. 7 ff) and their testimony as to the prior arrangements to pay them, but also the testimony of the Internal Revenue agents as to what appellants had themselves admitted with respect to the extent, scope, method, and participation by each appellant in their overall scheme to collect black market charges from their customers (*supra*, pp. 14 ff), the amended income tax return filed by appellants disclosing overceiling collections in the sum of \$141,125 [Govt. Exs. 35-49], the entire scheme to conceal these illegal collections, discussed more fully below. In addition, the jury, of course, had the right to draw reasonable inferences from the evidence before it. The legal effect of all the testimony before the jury was such as to allow it to convict one or all of the defendants on each count.

The trial judge was clearly correct, we submit, in admitting in evidence the testimony concerning which appellants complain under this point. And the jury was plainly warranted from all the evidence before it finding that the appellants were guilty, as found by its verdicts.

(b) The instruction sought by appellants (A. B. 12) as to a partner's liability for the criminal acts of his co-partner, clearly had no place at the trial below.

The evidence demonstrated beyond all doubt that each of the three partners in this case not only engaged in the illegal acts charged, but also participated in the illegal scheme and in illegal profits. The criminal acts performed by each partner were plainly performed as a part of the partnership business and with the knowledge and consent of each of the other partners.

Under the facts and evidence in this case, the trial judge correctly rejected the requested instruction No. 10.

Point Two

Appellants complain (A. B. 13 ff.) that the trial judge erred in admitting "opinions," "estimates" and "speculative" evidence as to the sums charged by appellants over the ceiling, and the number of times such overcharges were made.

(a) Appellants are clearly wrong in thus characterizing the testimony as to the amounts of overcharges. The testimony consisted of neither "opinions" nor "estimates," and certainly was not "speculative."

As stated by the witnesses (*supra*, pp. 9 ff), and admitted by appellants (*supra*, pp. 17 ff), the overceiling sums collected by appellants varied from time to time. Each witness testified to a precise overceiling sum paid by him as to each item concerning which he was questioned (see testimony and tables above, pp. 7 ff). Even in the testimony quoted by appellants in support of this point (A. B. 14-19), a precise overceiling sum was stated by

each witness.²³ Clearly appellants have no cause to complain.

(b) Appellants' complaints (A. B. 13 ff.), as to the testimony respecting the number of times witnesses said they paid overceiling to appellants, are likewise baseless.

First of all, it was immaterial how many times any purchaser paid overceiling to appellants. Insofar as the counts charging substantive violations of the Emergency Price Control Act were concerned, as each such count that the jury found one or more of the appellants guilty, a specific invoice was admitted in evidence and a purchaser testified that he paid the ceiling sums shown on that invoice but he also paid a specified overceiling amount (see *supra*, pp. 8 ff, including tables, pp. 10 ff).

Moreover, appellants admitted to others that they collected overceiling sums, to the extent of \$141,125, in a little over two years (*supra*, pp. 15 ff).

Manifestly no reversible error was committed by the trial judge in admitting in evidence the testimony objected to by appellants under this point.²⁴

²³Thus Dvorak testified in the excerpt quoted by appellant (A. B. 13 ff.) that he paid 5 cents a pound over ceiling for shortcut pork loins, 3 cents a pound for the "New York", 8 cents a pound for smoked hams (A. B. 14-15), while witness Snider testified that he paid 8 cents a pound overceiling for pork, 5 cents a pound for "bellies," 8 cents a pound for hogs, etc. (A. B. 17-19).

²⁴While appellants do not so state expressly, they also appear to attack under this point (A. B. 17-19) by innuendo the testimony of one of the witnesses on grounds of credibility. Such an attack is, of course, useless before an appellate court. The question of credibility was exclusively for the jury, and was decided adversely to appellants.

And the fact that the witness refreshed his recollection during a recess, is likewise without weight here, since it also goes to credibility.

Point Three

(a) Appellants object to the penalties imposed in this case (A. B. 20). While they admit that the imposition of sentences is "a matter generally within the province of the trial court" (A. B. 6), they also assert that the punishment in this case was excessive, that they know of no similar case (A. B. 6), and seek to convey the impression that the total overcharges involved in this case were about \$500.00 (A. B. 5).

The total black market overcharges conclusively shown to have been collected by appellants, were \$141,125 (*supra*). Likewise conclusively established by the record was a scheme to violate the Emergency Price Control Act and Regulations so brazen, wilful, deliberate, and coldly calculated, as to permit no sympathy for appellants' present plight.

The wholly discretionary sentence imposed by the trial judge was well within the maximum of imprisonment and fines which could have been imposed upon each of the appellants. Compared to the admitted overceiling collections, appellants are still ahead over many thousands of dollars as a result of their openly illegal acts.

To agree with appellants' contention that the sentences were excessive, is to countenance deliberate disobedience of the law on a vast scale and reduce the penalty exacted to a mere percentage payment on the overall overcharges, amounting in effect to a mere license fee to operate illegally. Surely this court will never countenance such a proposal.

The sentences should be permitted to stand.

(b) Appellants' "good faith" was not, contrary to their contentions (A. B. 20-ff.), an issue in this case.

Insofar as mental attitude was an ingredient of the offenses charged, the only element which the government was required to establish as to count 1 was that appellants acted "intentionally," and under the other counts, that they acted "wilfully."

The trial judge gave complete instructions as to these elements (R. 546, ff.). His refusal to give the specific instructions sought by appellants (A. B. 22-23), was clearly correct. Those requested instructions fail to state the law correctly and seek to inject into the case irrelevant considerations.

Moreover, the circumstances under which appellant collected the overceiling charges, which we have detailed above, disclose clearly that such black market charges were a *sine qua non* to the sale of meat by appellants; that was the primary objective of all of appellants' machinations—overceiling collections. To argue, as appellants now would appear, to, that their "good faith" was not fully placed before the jury, is not only to reject the controlling law on the subject, but also to deliberately brush aside all of the evidence in the case. That this court obviously will not require or do.

Then, appellants' knowledge or lack of knowledge of the regulations which they urge as a ground for reversal (A. B. 22), is likewise irrelevant. Apparently appellants and their counsel are not convinced of the universally accepted fact that ignorance of the law is not an excuse for its violation. And they likewise appear to be unaware of the established law that it is not necessary for the government "to prove the terms of any of the regulations" (A.

B. 22) whose proper promulgation and publication in the Federal Register neither was, nor can be successfully challenged in this case.

The trial judge's instructions here [R. 546, ff.] are correct and amply set forth the controlling law. Appellants' complaints on this score also are baseless.

Point Four

Appellants assert (A. B. 25) that they were denied a fair trial because the trial judge admitted in evidence testimony by Internal Revenue agents of statements made to them by the appellants.

Upon this contention, covering twenty-seven pages of their brief, appellants place their heaviest reliance in their fight to upset the judgments below. Here again, however, appellants magnify to unjustified proportions ordinary administrative acts of government officials, performed in full compliance with applicable statutory and regulatory requirements. Once more appellants seek to divert this Court's attention from the magnitude of their own offense by a microscopic examination and telescopic enlargement of every word and deed. Although appellants seek to shift the burden from their own shoulders to that of others, they clearly do not succeed.

Briefly, what transpired was this:

As we have already demonstrated above, in perpetrating their continued and planned disregard of the O.P.A. regulations as to maximum prices on meat, appellants also found it necessary to falsify their records so as not to show the true prices collected by them, to avoid detection by the O.P.A. of their price violations. Appellants also deliberately falsified their income tax returns, in the main

for the purpose of misleading the O.P.A. This placed appellants in the position of committing the additional violations of income tax evasion.

Although appellants were not disturbed by the fact that they were engaged in wilful violation of the O. P. A. law and regulations, they appear to have taken a more serious view of their income tax frauds and consequently cast about for ways and means to improve their status in the latter respect. Appellants therefore sought the aid of their attorneys, who in turn sought more specialized counsel. The latter, tax consultants, devised a method whereby, in their opinion, appellants could continue their concealment of their true income from the eyes of the O. P. A., while simultaneously disclosing the true facts to the Bureau of Internal Revenue.

Guided by counsel and under their direction, appellants voluntarily filed, as admitted by them (A. B. 25), an amended partnership income tax information return and amended individual income tax returns [R. 264, 437], disclosing the receipt of \$141,125 in additional, previously unreported, income. Then, still under the guidance and direction of their counsel, appellants voluntarily appeared before agents of the Bureau of Internal Revenue assigned to investigate the amended tax returns by appellants.

There, after appropriate warning that they had the right to refuse to speak and to refuse to incriminate themselves, and after consultation with their counsel, and upon the latter's advice, appellants made to the Internal Revenue Agents complete disclosures, in substantiation of their returns, of the true amount, nature and source of their \$141,125 additional income. The statements made by appellants were reduced to writing and, after examination by appellants and their attorneys, were signed under oath

by appellants. In addition, and for the same purpose, appellants voluntarily submitted to the Bureau of Internal Revenue a financial report as to the \$141,125, prepared by their accountant [R. 404, 408].

As conservatively characterized by appellants (A. B. 25), the statements made by them “show that defendants [appellants] had been selling their products at over ceiling prices.” What this artful understatement fails to say, is that appellants’ statements disclose a systematic, planned, concerted and arrogant disregard of the mandatory provisions of an Act of Congress, the Emergency Price Control Act, and disclose an illegal scheme of proportions and ramifications not often brought to light.

At the trial, the written statements were offered in evidence. However, upon a strict construction of the letters authorization given to the Internal Revenue agents to make disclosure of the facts and evidence in their possession (see also *infra*, pp. 36 ff), the trial judge sustained appellants’ objection to the admission in evidence of the written statements.²⁵

The letters of authorization [R. 273, 277] name appellants’ partnership, the Vernon Hotel and Restaurant Supply Company, under which every act material to this indictment was committed; the letters do not name each partner—appellants—individually. The trial judge held that the written statements signed by appellants were, therefore, not admissible in evidence. He did admit, however, statements made by appellants as to the source of the *partnership* income, in view of the specific identification of the partnership by name in the letters of authori-

²⁵The signed written statements, were printed in the record [R. 473 ff.] upon appellants’ insistence.

ty [R. 273, 277]. We submit that the trial court was not only correct as to the evidence admitted in this respect, but also could and should have admitted in evidence appellants' written, signed statements.

The Evidence Adduced from the Internal Revenue Agents Was Properly Received Into the Record.

The sole question presented at this point is whether the trial judge committed reversible error by admitting into evidence the testimony of the Internal Revenue Agents as to statements made to them by the appellants respecting the income of the Vernon Hotel and Restaurant Supply Company. We submit that no reversible error was committed in this connection.

Income tax returns, an information return such as was filed by the partnership here, and "schedules, lists and statements designed to be supplemental to, or become a part of, the returns," are all subject to the same rules and regulations as to inspection (See appellants' Brief, pp. 27-29 for regulations). These provide in effect that all of the above may be obtained by a United States Attorney for official use before a grand jury or in litigation in which the United States is interested, or for use in preparation for either; that these may be obtained upon written request of the Attorney General, an Assistant Attorney General, etc.

Here an Assistant Attorney General in writing requested the Commissioner of Internal Revenue for permission to inspect and use statements and other documents and to have Internal Revenue agents testify before the grand jury and at a trial [R. 294-298]. Such authority was granted by the Acting Commissioner of Internal Revenue [R. 273-274, 277-279], and certified copies of

the amended information and income tax returns were furnished by him under his signature [Govt. Exhibits 35-49],²⁶ and he authorized the Internal Revenue agents who testified at the trial below to do so, as well as to testify before the grand jury and give information to the U. S. Attorney [R. 273, 277], and authorized such testimony not only as to the partnership but also as to “the members of a partnership called *Vernon Hotel and Restaurant Supply Company*” [R. 273, 278]. (Italics ours.)

There was, thus, strict compliance here with every provision of the law and regulations, and the information and documents in the possession of the Internal Revenue Agents were duly made available to the government in full conformance with legal requirements.

The propriety of this procedure has been recognized by this Court in *Gibson v. United States*, 31 F. (2d) 19, cert. den. 279 U. S. 866. See also *Greenbaum v. United States*, 113 F. (2d) 113, 126 (C. C. A. 9); *Leroy v. United States*, 29 F. (2d) 462, 464 (C. C. A. 7), cert. den. 279 U. S. 850, *Lewis v. United States*, 38 F. (2d) 406 (C. C. A. 9). And while appellants must be aware of the holding in the *Gibson* case since they cite it (A. B. 29), they avoid mention or explanation of its terms in this respect in their brief, electing instead to argue at great length contentions no longer open to them under all of the above decisions.

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case, the government there introduced in evidence, over

²⁶T. D. 4945, Sec. 463 D5 (C. C. H., par. 518) provides in part:

“Certified copies [of returns] will be furnished only upon specific request therefor sent to the Commissioner at Washington.”

objection by the defendant, an affidavit made by the defendant *six months after the return of the indictment*, and had delivered it to a deputy collector of internal revenue *with the assurance on the part of the deputy that it would be considered only as bearing on affiant's income tax obligation*. The decision states (p. 22):

“Over objection the court received in evidence an affidavit made by defendant Curtis in August, 1927, about 6 months after the indictment was returned. Curtis delivered the affidavit to a deputy collector of internal revenue, with the assurance on the part of the deputy that it would be considered only as bearing on affiant's income tax obligations, and would not be used against him in any case pending in court. It is in the nature of a supplementary return, and the statements therein made bear somewhat remotely upon the question of Curtis' guilt. * * *”

“The deputy collector was incompetent to waive such right, if any, as the government had under the law to make use of the affidavit as evidence, and the remaining question is of such right. By a rule of the Treasury Department (Regulations 69, art. 1091; Treas. Dec. 2962; *In re Epstein* (D. C.), 300 F. 407; *Id.* (C. C. A.), 4 F. (2d) 529), it is provided that upon the written request of the Attorney General, or one of his assistants, an income tax return or a copy thereof may be furnished by the Commissioner to a United States attorney for use as evidence in any litigation in court, where the United States is interested in the result. Or, if the return is in the possession of a collector, it may, upon the conditions stated, be furnished by him. When the return or a copy thereof is so obtained, its use is to be limited to the purpose for which it is furnished, and unnecessary publicity is to be avoided. The use of re-

turns in legal proceedings with such limitations is also recognized in the President's executive order of April 13, 1926, approving regulations of the Secretary of the Treasury, paragraph 14 of which provides: 'In the case of returns or copies thereof furnished by the department for use in legal proceedings only such inspection as necessarily results from such use is permitted.' Regulations 69, p. 203. The record shows that, following a telegram from the district attorney to the Attorney General, requesting that authority be secured from the department for the use of the affidavit, a telegram was received by the collector having custody of the affidavit, from the Commissioner, directing him to produce it and to furnish a copy thereof, if a copy was desired by the district attorney. Indulging the presumption of official regularity, we think this was sufficient to warrant what was done."

In the *Lewy* case the Appellate Court, in part, said (p. 464):

"The contention that those government returns were improperly admitted in evidence, because the statute provides that they are not open to inspection, is not well grounded. Revenue Act 1924, §257, reads in part: 'Returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President. * * *' (43 Stat., p. 293.)

"Treasury Regulations No. 65 shows that the President directed that such returns should be open to inspection in accordance with the regulations prescribed by the Secretary of the Treasury. Treas. Reg. No. 65, art. 1090, p. 192. Regulation No. 14

(page 194, Treas. Reg. No. 65), prescribed by the Secretary of the Treasury, provides: 'A person who under these regulations is permitted to inspect a return may make and take a copy thereof or a memorandum of data contained therein.'

"Article 1091, Treasury Regulations No. 65 (page 195), states: 'The original income return * * * or a copy thereof, may be furnished by the Commissioner of Internal Revenue to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result. * * *'"

Because, as we said (*supra*, p. 31), the letters of authority here in the caption only identified the appellants by their partnership name of Vernon Hotel and Restaurant Supply Company, the trial judge confined the testimony of the agents to statements by appellants relative to the partnership income, excluding from evidence the individual's returns and their written, signed statements [R. 318-321]. Had the trial judge admitted the evidence as to the individuals, he would have been fully justified in view of the fact that the only persons who constituted the partnership entity, were the appellants. Clearly, however, the trial judge's ruling was more than fair to appellants, and plainly without error in any respect.

Thus the agents testified only concerning statements made to them by appellants *as to the income of the Vernon Hotel and Restaurant Supply Company*; they did not testify concerning the income of the individual partners, which consisted, of course, of each partner's distributive share of the partnership income. Manifestly, appellants have no cause to complain on this score.

Furthermore, a federal court probably has the power to order an Internal Revenue agent to testify even in the absence of express authority to the agent from his superiors. To hold the contrary is to deny to the court one of its most important powers, that of compelling testimony. And to circumscribe that power by the exercise of the will of an agent's superior, would likewise render the power a nullity dependent upon the superior's general attitude and personal construction of the law and the facts. Such a result clearly cannot prevail.

The enumeration of various functionaries who must follow a definite procedure to obtain access to documents and information in the possession of the Internal Revenue Bureau, without inclusion of the courts, expressly indicates, we submit, that the general power of the courts to compel testimony was not being restricted by Congress in any respect. Had there been no letters of authority whatsoever to the agents in this case, the trial judge could nevertheless have compelled them to testify at the trial.

In fact, at the request of the appellants, two agents, only one of whom had previously testified for the government, and neither of whom had express authority to testify as a witness for the appellants, were called to the stand by appellants and required to give testimony on a new subject [R. 447-452].²⁷

²⁷Also, upon appellants' demand, the trial judge required the prosecuting attorney to testify as a witness for the appellants concerning events before the grand jury—a secret proceeding—and despite the prosecuting attorney's statement that he did not know whether he was authorized to testify [R. 452], and that he had testified in one proceeding and later had been informed that he had no right to do so [R. 452].

Plainly the trial court committed no reversible error by admitting the agents' testimony into the record.

Appellants assert also (A. B. 33, ff.) that the use of the written statements, not admitted in evidence, by the agents to refresh their recollections, constitutes ground for reversal of the judgments. The assertion is specious.

The short answer, aside from the fact that oral testimony is admissible even if written memoranda or it may not be admissible, is that the use of any object in itself inadmissible in evidence, to refresh a witness' recollection, is always proper, provided it tends to aid the witnesses to remember. See, *e.g.*

Goldman v. United States, 118 F. (2d) 310 (C. C. A. 2), cert den. 313 U. S. 588, aff'd 316 U. S. 129;

Luse v. United States, 49 F. (2d) 241;

Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9);

Olmstead v. United States, 19 F. (2d) 842 (C. C. A. 9);

Delaney v. United States, 77 F. (2d) 917 (C. C. A. 3);

Hodson v. United States, 250 Fed. 421 (C. C. A. 8);

Briggs Mfg. Co., v. United States, 30 F. (2d) 962 (A. C. Conn.), rev'd on other grds. 40 F. (2d) 425;

Breese v. United States, 106 Fed. 680 (C. C. A. 4).

As stated by this court in the *Jewett* case, *supra* (p. 956):

“* * * it is quite immaterial by what means the memory is quickened; it may be a song, or a face,

or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.”

More important, however, is the fact that the writings from which the agents refreshed their recollections, the statements signed by appellants, *were at all times legally and properly in the agents' possession*, regardless of whether they may or may not have been properly in the prosecutor's possession. Thus during the period of the agents' continuous legal possession of and access to the written statements, the agents themselves were always entitled to use those documents for all purposes within the scope of their authority. If the agents could testify at all, they certainly could use their papers to refresh their memories.

Appellants assert in effect that the statements made and information furnished by them to the agents was confidential (A. B. 35-37), and that they were assured that no one but the Internal Revenue Bureau would have access to them (A. B. 39, 42, 45). Neither is true.

There is no confidential relationship between government agents and those who come before them; and appellants do not—as they cannot—point to any legal basis for their position in this respect. The California Code section cited by them (A. B. 64) clearly is not applicable here either on the law or the facts to this case.

Appellants' assertions that they were led to believe by government agents that their disclosures would be kept secret, are likewise untenable. First of all, there is not

one iota of accepted evidence to support them in this respect.²⁸

Appellants, admittedly, voluntarily filed amended income tax and information returns, under guidance of experienced tax counsel. These expert counsel could hardly claim ignorance of the provisions of the United States Code and Internal Revenue dealing with disclosure of information by the Treasury Department to the United States Attorney!

Then, the Internal Revenue agents testified *without contradiction*, (*supra*) and appellants' counsel admitted (A. B. 47-48) that appellants appeared voluntarily to give supporting information in connection with their amended returns (A. B. 30, R. 372 *ff.*); that their counsel were present at all such conferences (*id*); that appellants were specifically warned of their constitutional right against self incrimination, and warned that the statements they made or any documents or evidence they produced could be used against them in any subsequent proceeding by the government; that appellants then consulted their attorneys, who advised them nevertheless to answer (*id*).²⁹

²⁸Of course, here, as elsewhere, only the evidence most favorable to the government will be considered upon this appeal, and any conflicts in evidence are to be disregarded, with full credit being given to the evidence supporting the judgments below.

²⁹Appellants' statement (A. B. 46) that "there is no evidence that appellants were ever asked to waive the provisions of the Treasury Regulations relating to the use by the government in any actions of their oral or written statements," is not supported by either the facts or the law. Moreover, no such waiver was required as the Treasury Regulations affirmatively provided a method making all documents and information obtained by employees available to the United States Attorney.

This constituted a waiver, of course. See *e.g.*:

Heller v. United States, 57 F. (2d) 627 (C. C. A. 7), cert. den. 286 U. S. 567;

Viereck v. United States, 139 F. (2d) 847 (App. D. C.), cert. den. 321 U. S. 794;

Hartzell v. United States, 72 F. (2d) 569 (C. C. A. 8), cert. den. 293 U. S. 621;

United States v. Gilbert, 31 Fed. Supp., 195 (D. C. Ohio).

See also: *United States v. Sullivan*, 274 U. S. 259.

Then evidence showing any fact relevant to the charge in the indictment,³⁰ or evidence tending to throw light upon the conduct of the accused,³¹ is admissible.

While appellants, in support of their contention that they were assured that "the statements would be for the eyes of the Internal Revenue Department," (A. B. 52) state that one of the agents admitted that "before the appellants gave their respective statements there was a discussion off the record [R. 375]" (A. B. 52), appellants fail to apprise the court at this point that their own tax counsel admitted on the stand that in the discussion

³⁰See, *e. g.*: *United States v. Tandaric*, 152 F. (2d) 3 (C. C. A. 7), cert. den. 66 S. Ct. 703; *United States v. Rubenstein*, 151 F. (2d) 915 (C. C. A. 2), cert. den. 66 S. Ct. 168; *Hilliard v. United States*, 121 F. (2d) 992 (C. C. A. 4), cert. den. 314 U. S. 627; *Troutman v. United States*, 100 F. (2d) 628 (C. C. A. 10); *Crapo v. United States*, 100 F. (2d) 996 (C. C. A. 10); *Suhay v. United States*, 95 F. (2d) 890 (C. C. A. 10), cert. den. 304 U. S. 580.

³¹See, *e. g.*: *Hodge v. United States*, 126 F. (2d) 849 (App. D. C.); *Robinson v. United States*, 144 F. (2d) 392 (C. C. A. 6), cert. den. 323 U. S. 789, rehear. den. 324 U. S. 889; *Devoc v. United States*, 103 F. (2d) 584 (C. C. A. 8), cert. den. 308 U. S. 571; *United States v. Sebo*, 101 F. (2d) 889 (C. C. A. 7).

off the record he advised the appellant to whom he was speaking that it was proper for him to answer the questions put to him [R. 465]. And he admitted that no such purported guarantee of secrecy was included in appellants' signed statements [R. 468].

What happened here is clear: Appellants' counsel, seeking a method whereby their illegal income could be disclosed for tax purposes while continuing its concealment from the O. P. A. and others, evolved what they conceived to be a fool-proof method. Obviously they failed to take cognizance of the fact that even if the Internal Revenue Bureau could decline to disclose the evidence in their possession to the O. P. A., it had been expressly provided by statute and regulation that all such information was to be made available to the United States Attorney and to others in the Department of Justice upon request. And even the agents called by appellants as their witnesses, told appellants' counsel that they would not be able to make disclosure of the matters disclosed to them, as one put it, "unless I was authorized to do so" [R. 449] and as the other testified, he could make disclosures to no one "except those authorized by the Treasury Department" [R. 452].

Then, it is important to note that none of the information possessed by the Internal Revenue Agents was ever furnished by them to the O. P. A.; all that actually was furnished, was supplied to the United States Attorney.

Moreover, even if appellants might have received assurances by Internal Revenue Agents as to non-disclosure to the O. P. A., no such assurances were or could have been given as to disclosures to the U. S. Attorney. Of course, it need hardly be argued in this respect also, that

no agent could bind the Treasury Department contrary to the latter's provisions or regulations or contrary to his superior's right to act within the scope of the latter's authority and later make disclosures. See *e.g.*, *Gibson* case, *supra*.³²

Appellants sought to use extra-legal methods to accomplish their continuing conspiracy to conceal from the O. P. A. their illegal charges and collections. Their scheme backfired, and now they seek to extricate themselves by pointing an accusing finger at the federal law enforcement agents, raising picayunish objections and making unsupported arguments. This court should not permit them to succeed in their illegal objectives through such tactics.

Point Five.

During the trial appellants for the first time sought to quash the indictment on the ground that it was obtained from the grand jury upon evidence which they asserted was improperly obtained—the statements to the Internal Revenue Agents discussed under the last point.

First of all, this motion to quash the indictment was not made in time. Here the indictment was returned on March 11, 1946 [R. 2], and the motion was first made at the trial, in June, 1946. And no defect appears on the face of the indictment.

Then, the evidence conclusively shows, without contradiction, that the three written admissions signed by the appellants were not used before the Grand Jury. [R. 385, 386, 387, 397, 453, ff.]. although permission to use in-

³²“* * * The deputy collector was incompetent to waive such right, if any, as the government had under the law to make use of the affidavit as evidence.” (The *Gibson* case, *supra*.)

formation regarding appellants in the possession of the Internal Revenue Agents was sought and obtained from the Commissioner of Internal Revenue prior to the return of the indictments. Despite the categorical denial in this respect (A. B. 58) by the only witness called to the stand by appellants in this connection, despite a total absence of any evidence to the contrary, and despite the fact that at the trial counsel for appellants agreed that without contrary evidence, such testimony had to be accepted (A. B. 58) and was accepted by appellants (A. B. 59 also R. 387), appellants now seek by innuendo and direct statements to cast doubt upon that testimony (A. B. 53).

To further bolster their position, appellants' counsel then points to his own unsupported arguments and assertions before the trial judge (A. B. 60-62) and indulges in wholly unwarranted assumptions as to what transpired before the grand jury (A. B. 60, 61, 62).

Here again, as in the preceding point, appellants are obviously seeking to shift the spotlight from their avowedly illegal operations and their brazen scheme to undermine the laws enacted by Congress; in their effort to escape, appellants not only seek to confuse this Court by specious and frivolous arguments, but also deliberately attack the credibility of uncontradicted, reputable witnesses by indulging in unwarranted innuendos, and in unsupported contentions.

Such clear attempts to further circumvent the law by offering unsupported contentions in order to extricate appellants from their present position, should be summarily rejected.

The attack upon the sufficiency of the indictment is plainly without merit, and warrants no further discussion.

Point Six.

An audit prepared by appellants' certified public accountant, constituting "an analysis of the overcharges received by appellants" (A. B. 64), and voluntarily sent by them to the Bureau of Internal Revenue in their effort to extricate themselves from their income tax difficulties, was received in evidence [Govt. Ex. 58; R. 407, *ff.*].

Appellants assert that "there was no evidence that either appellants William Shubin or Frederick Shubin had authorized "delivery or disclosure of the audit to the Internal Revenue Agents, and that neither of them were present when their tax counsel delivered it" (A. B. 64).

The spuriousness of this contention is self-evident. The audit [R. 408, *ff.*] was prepared at the behest of all of the appellants [R. 415, 404, 408, *ff.*] for the express purpose of delivering it to the Internal Revenue Agents [R. 415-416], and "their tax counsel" delivered it (A. B. 64), manifestly as their agent. Moreover, Kissel was present, and participated in the delivery as agent for the other appellants [R. 404, *ff.*].³³

The further contention that the audit was a privileged communication between attorney and client (A. B. 64), is likewise frivolous. Even if it had been such, and we deny that it was, the delivery of the audit to a third party—the Internal Revenue Agent—would have dissipated its privileged status. Plainly here again appellants are grasping at every straw to avoid the consequences of their gross violations.

³³Power of attorney was given to their counsel by appellants [R. 483].

Point Seven.

a.

Appellants assert that “statements of a conspirator not made in furtherance of the conspiracy are insufficient proof standing alone” (A. B. 67). This assertion is meaningless.

Possibly appellants meant to say that statements of one conspirator, when recitative of the past events which are charged as the conspiracy and constituting admissions, are not binding upon any of the co-conspirators except the one making them or in whose presence they are made. If that was appellant’s intention, their position nevertheless is untenable.

First of all, the statements made by appellants to the Internal Revenue Agents were in part in furtherance of their conspiracy, in that they constituted a wilful continuance of appellants’ scheme and attempt to falsify their records and conceal from the O. P. A. the fact of their illegal overcharges. These statements were made in July and August, 1945 [R. 473, *ff.*], and the conspiracy alleged in the indictment was charged as continuing to the date of the indictment, March 11, 1946 [R. 2, *ff.*].

All of appellants’ actions and statements *vis-a-vis* the Bureau of Internal Revenue—their attempts to declare their full income without disclosures to O. P. A., their letters, statements and audit, their attorneys’ representations orally and in writing—were in continuing concealment of their illegal collections and actually perpetrated their falsification of their books and records as to their true receipts from their meat sales. All their actions and statements with respect to the Bureau of Internal Revenue

were, consequently, in furtherance of their conspiracy and a continuance of it. Their individual statements to the agents were, therefore, proper evidence against all of the appellants, not merely against the one who made them.

Further, however, are the facts, not mentioned by appellants to this Court, that *each* of the appellants made a substantially similar statement to the Internal Revenue Agents (*supra*, see also R. 437, *ff.*), that all three filed the partnership return disclosing the collection of \$141,125, that each appellant admitted this sum to have been composed of overceiling charges in the sale of meat (*supra*, pp. 15 *ff*), that all of the appellants were represented by the same tax counsel and the same attorney at the trial, and that all three appellants were admittedly partners, knowingly and by prearrangement sharing all profits, legal and illegal (*supra*, pp. 17 *ff*).

Then, in addition, appellants have failed to apprise this Court of the fact that the statements made by each of the appellants to the agents were offered in evidence only as to the particular appellants *making them* [R. 383].

Moreover, all this evidence plainly disclosed a common scheme or plan to conceal true income and collections, and proof of that in any respect would be admissible to prove the offense charged in the indictment.

See, *e. g.*:

United States v. Fuffanelli, 131 F. (2d) 890 (C. C. A. 7), cert. den. 318 U. S. 772;

Weathers v. United States, 126 F. (2d) 118 (C. C. A. 5), cert. den. 316 U. S. 681;

United States v. Cohn, 145 F. (2d) 82 (C. C. A. 2), cert. den. 323 U. S. 799;

Bracey v. United States, 142 F. (2d) 85 (App. D. C.), cert. den. 322 U. S. 762;
United States v. Bradley, 152 F. (2d) 425 (C. C. A. 3);
Banning v. United States, 130 F. (2d) 330 (C. C. A. 6), cert. den. 317 U. S. 695;
United States v. Harrison, 121 F. (2d) 930 (C. C. A. 3), cert. den. 314 U. S. 661;
Witters v. United States, 106 F. (2d) 837 (App. D. C.);
Gianotos v. United States, 104 F. (2d) 929 (C. C. A. 9);
United States v. Sebo, 101 F. (2d) 889 (C. C. A. 7);
Cook v. United States, 28 F. (2d) 730 (C. C. A. 8);
Breese v. United States, 203 Fed. 824.

For all of these reasons, the admission of the testimony in question was clearly warranted.

b.

Appellants are plainly wrong when they assert (A. B. 69) that the testimony of the meat purchasers “shows no conspiracy among the appellants.” We submit that the testimony of the three purchaser witnesses (*supra*, pp. 7 ff), without more, is sufficient to support the verdict of guilty as to each as to the conspiracy. That testimony discloses not only systematic collections of overceiling charges by appellants, but also a planned procedure and uniform practice in computing the overceiling sums, receiving that money in secret, and deliberate recordation of false sums—the legal price—on the face of the invoices given to the customers, as well as at least one other out-

rageous instance of falsification of other transactions (R. 111, ff.). Upon such testimony, together with the invoices introduced in evidence, and the permissible inferences which could reasonably be drawn from them, the jury obviously was warranted in predicating a verdict of guilty as to each of the appellants upon the conspiracy count (count 1) of the indictment.

Appellants, deliberate, scheming violators of the Emergency Price Control Act and the conspiracy statute, having illegally acquired \$141,125 in black market collections in the sale of meat, having deliberately falsified their records as to such collections, having manipulated their books so as to conceal from the O. P. A. their true workings, and having worked out a further method for concealing the truth from the O. P. A. while protecting themselves from effects of originally understating their income for federal income tax purposes, now seek to escape the consequences of their activities by clutching at straws, overstating facts helpful to their objective, understating the facts demonstrative of their culpability, exaggerating the effect of almost every word and action of the trial judge, government counsel, and government law enforcement bureaus, and trying to obtain from this Court a reweighing of testimony, a reconsideration of credibility of witnesses, a reexamination of all facts and permissive inferences.

Having offered not one word of contradiction to the overwhelming evidence of their open disregard of, and contempt for the law, appellants seek reversal of their judgments upon flimsy, untenable grounds.

All of the appellants were found guilty of conspiracy. Appellants William Shubin and Kissel also were found

guilty of specific overceiling sales and false entries, while Frederick Shubin also was found guilty of false entries. Upon the testimony and record evidence before it, as well as appellants' individual statements as to their participation in the black market operations, these verdicts of the jury were eminently correct.

Conclusion.

No reversible error was committed by the trial judge. The appellants were given a fair trial. The verdicts are supported by the evidence. The sentences are moderate and clearly justified under the circumstances. The judgments should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant U. S. Attorney;

WILLIAM STRONG,
Assistant U. S. Attorney,
Attorneys for the Appellee.

APPENDIX

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides:

“Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *

Section 1364.407 Records and reports. * * *

“(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for

so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *

“Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.

No. 11382.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and
JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

McLAUGHLIN, MCGINLEY & HANSON,

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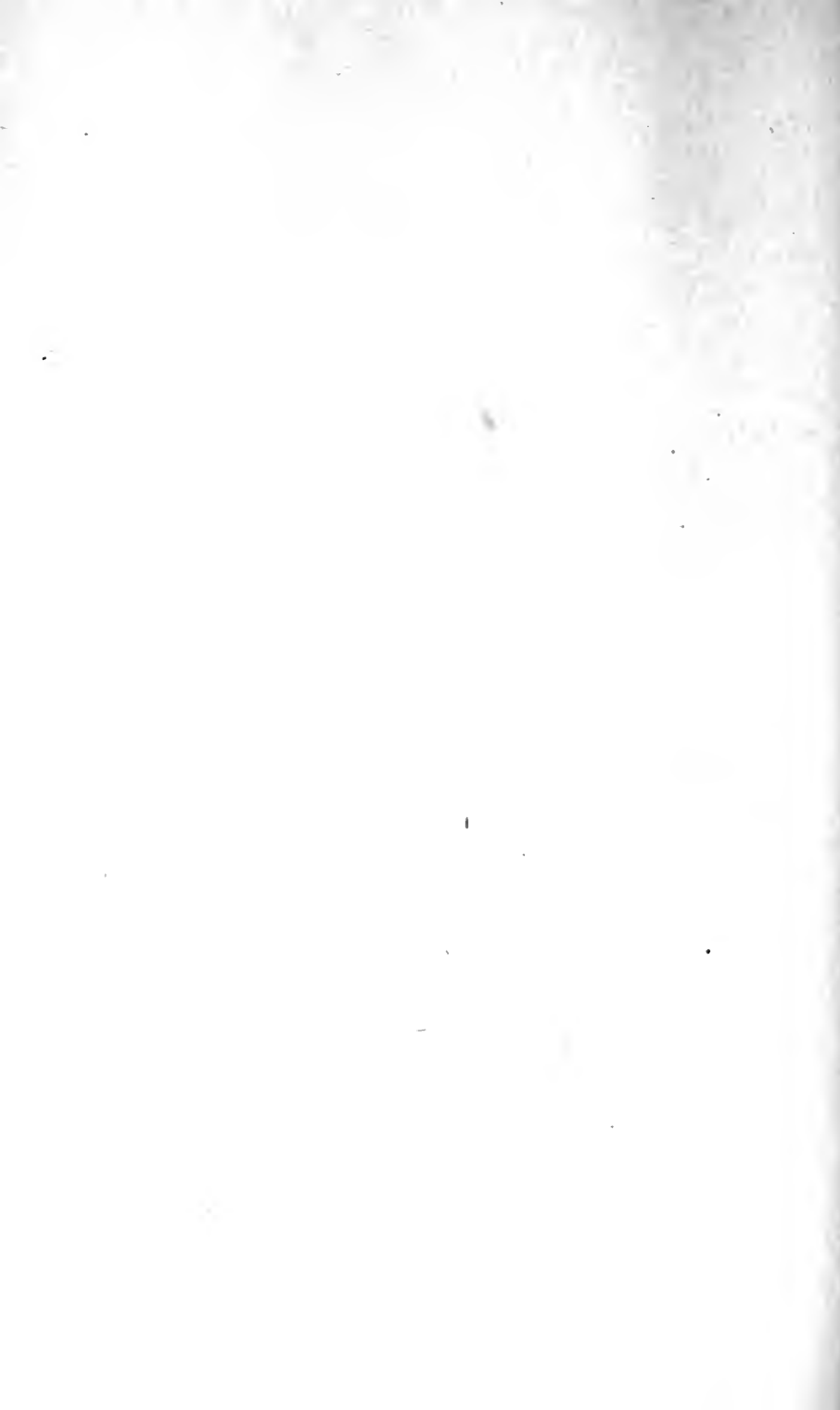
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APPELLANTS' REPLY BRIEF.

The appellee's brief does not meet the issues presented upon appeal. It sidesteps them by attempting to justify the admissibility of the evidence because of its probative value regardless of whether it was lawfully obtained.

Appellants have contended that there was no competent evidence of their guilt. In response to this, appellee says, on pages 7 and 8, that the witness Dvorak's testimony was uncontradicted. We know of no better contradiction than the witness' own testimony. It is true that this witness, in answer to preliminary questions, had testified to his conclusions that appellants had required him to pay over ceiling prices, but on cross-examination, he could not designate the time of this conversation, nor what was said.

We do not wish to deprive appellee of the advantages of any competent and admissible testimony, but we believe that the following portion of Mr. Dvorak's testimony on cross-examination dissipates its effect entirely.

"Q. And you testified that in the fall of 1942 that you had a discussion with Mr. Shubin at your place of business. Do you remember that testimony?

A. Yes, sir.

Q. Prior to the time that he came to your place of business you had purchased some meat which the Shubins had had delivered to your place of business, hadn't you? A. Yes, sir.

Q. And your butcher, who was there, paid them what you believed was more than the ceiling price? A. Yes, sir.

Q. And you called Mr. Shubin on the telephone and told him that there had been an overcharge of \$7.50? A. Yes, sir.

Q. And Mr. Shubin immediately brought you the money out and he paid you \$15.00 instead of \$7.50, didn't he? A. Yes, sir.

Q. And at that time you had a discussion with Mr. Shubin regarding the difficulty of obtaining meat in the meat market, didn't you? A. Yes, sir.

Q. At that time you were purchasing meat from other people than the Vernon Hotel & Restaurant Supply Company, weren't you? A. Yes.

Q. Several other concerns? A. Yes.

Q. And you were having difficulty at all of those places in getting meat? A. Yes.

Q. And Mr. Shubin said to you, after you told him of your difficulties, in substance, if you want to stay in business you got to play ball these days; is that what he said? A. Yes.

Q. Did Mr. Shubin tell you at that time that you had to pay him any price in excess of the ceiling price? A. No.

Q. Now, thereafter you came to Mr. Shubin's place of business, I think the next day, and you told him that you were unable to get any meat from anybody, didn't you? A. Yes.

Q. And Mr. Shubin gave you a truck load of meat, didn't he, or told you that you could take it? A. Yes.

Q. And did he tell you that you had to pay anything over ceiling? A. Not at that time; no, sir.

Q. From then on, when you purchased meat, you would see Mr. Shubin or Mr. Kissel? A. Yes.

Q. As you testified? A. Yes.

Q. Now, can you tell the court and the jury of any particular time when Mr. Shubin or Mr. Kissel asked you to pay them any money over ceiling, when they requested it?

The Witness: Would you ask me that again?

The Court: The reporter will repeat the question.

(Question read by the reporter.)

A. Well, I can't pick out any one certain date or certain amount, but there was a set figure that I had to pay.

Q. By Mr. McLaughlin: Well, what I am trying to get at is just when that discussion took place. Now, thus far there is nothing in the record on it and you have to help us now, if you can, and tell us when there was such a discussion. A. Well, that is a long time to remember word for word.

Q. Well, you testified when Mr. Shubin came out and paid you the money, which you said had been an overcharge, that you had a discussion. He did not ask you for any overcharges then, did he? A. No, sir.

Q. All right. Now, you must have in your mind some time when Mr. Shubin or Mr. Kissel asked you or told you that if you wanted to buy meat from them you had to pay them in excess of the ceiling.

The Court: When you say 'Shubin,' there are two.

Mr. McLaughlin: I am sorry. Mr. Shubin or Mr. Kissel. A. Well, I can't pick out how much was stated at that time, but I—

Mr. Neukom: Let the witness explain.

Mr. McLaughlin: We haven't any time yet. Let us get a time first. A. Well, when I started back in business with them they come to some set figure that I had to pay.

Q. Mr. Dvorak, I am trying to get, as near as you can fix, a time and place where either of the Shubins or Mr. Kissel were present when it was told to you that you had to pay over ceiling. Now, you try and help us fix that time and place and then we can go from there on as to what they said and what you said. A. Well, I would say the first of '43, to be more sure of it, or the last part of '42.

Q. How long after the time that Mr. Shubin came to your place of business to repay you the \$7.50? A. Well, right at that time I quit buying from them for a short spell in there, and then I went back of my own accord to purchase meat from them.

Q. You called on them? A. I called on them; yes, sir.

Q. All right. And you saw who? A. Bill.

Q. That was at the plant? A. At the plant.

Q. Will you state what you said and what Bill said, as near as you can state it? A. Well, I told him—well, prior to that time, while he was at the shop he told me that I didn't—

Q. Wait now. We want this discussion. If there was a prior one, we will take it. Was there a prior one? A. Well, this is in connection with it. I just want to relate the things that brought me there.

Q. You had a discussion with Mr. Shubin before you went to his plant, then? A. Yes. He told me I didn't have to buy meat from him or—

Q. We have to get the place and the parties. Before you went to the plant, you had another discussion with Mr. Shubin? A. Well, that was the same one. A little of it is coming back to me. He told me that I didn't have to buy from him but he always thought quite a little bit of me and didn't claim—he didn't want me to lose my business by not having merchandise; and he told me if I ever felt different about it, that I could always buy if I wanted to. So I went back there of my own accord to purchase meat.

Q. All right. Then you went to the plant. Have you stated everything that was said at the discussion you have just related? A. As near as I can remember.

Q. You went to the plant and what was said then? A. Well, I can't recall the exact words that were mentioned at that time, but no doubt, naturally, I come there for merchandise.

Q. Well, Mr. Dvorak, if you can't recall any words, nobody on earth can make you testify to that,

and you shouldn't. So, when you can't recall, say you can't. But if there is any part of a conversation you can recall, you tell the jury and the court what was said. A. Well, I want to stick to the truth as much as I can. I don't want to guess at something. I can't suck something out of my thumb if I don't know.

Q. Well, do you want the jury— A. I just don't recall.

Q. All right; that is all right. Now, do you have any recollection of any other discussions, then, at which you were told by any of the defendants that you had to pay over ceiling, leaving the one that you said you did not recall? If you had, say 'yes' and then we will fix the time and place? A. Yes.

Q. All right. Now, fix the time and the place. A. Well, it must have been at that time or shortly thereafter that there was some set price fixed.

Q. Well, now, wait. I want to get the time and the place and the parties, and then we will get to the discussion. You say that— A. Well, dates I do not remember.

Q. Now, you have already testified that you did not recall what was said at the discussion that you had when you first came to the plant after this lapse of time that you were not doing business with them; that is correct, isn't it? A. Yes.

Q. So it was not at that discussion? A. Well, it must not have been, then.

Q. All right. Did you have another discussion that you recall where you discussed with them the paying of over ceiling? A. I can't recall that I did." [R. 184-189.]

Pages 14 to 24 of appellee's brief is devoted to a summary of the testimony given by the Internal Revenue Agents. There is no serious controversy as to what these men testified to. The only issue is whether it was admissible because it was given after refreshing their memory from inadmissible documents, and because it was information obtained in the course of their official duties as such internal revenue agents, and therefore an "Information or Supplementary Return" within the meaning of the applicable Treasury Regulations. These agents testified that they were taking appellants' statements as supplementary information to their returns. [R. 318, 344 and 384.]

The trial court held that the written transcripts of these confessions were inadmissible because they were not obtained pursuant to the applicable Treasury Regulations [R. 284-309], and we believe that it should have consistently excluded the oral testimony as to the contents of these transcripts, particularly where the agents admitted refreshing their recollections from them. [R. 332, 348, 351, 400, 401, 419 and 420.]

The statute and the Treasury Regulations limiting access to income tax returns were obviously enacted with some purpose in view. Congress must have believed

that some immunity should be granted to taxpayers who were willing to pay their taxes on gains that might subject them to some other criminal penalty if disclosed. Neither the statute nor the regulations permit the Attorney General an unrestrained access to these returns.

If the Attorney General made a blanket request to the Commission of Internal Revenue for copies of all returns that showed a violation of any criminal statute, it should clearly be refused under these regulations.

The regulations show an intent that the returns be made available only when material to a grand jury investigation or trial of some party or parties. They require that the names of the parties be given whose returns are desired. Here the appellants' returns were not requested by the United States Attorney, but the Commissioner voluntarily included them. The situation is no different than one where the Commissioner delivered the returns without any request therefor whatsoever.

Suppose the return of a corporation had been requested and the Commissioner voluntarily included the returns of all of its shareholders. Could these returns be used to indict and convict such shareholders? Is there any difference where the return of a partnership is requested, and if so, would a request for the partnership return authorize the Commissioner to furnish the personal returns of all the partners? The Commissioner is not vested with power to furnish returns or supply information which is not even requested pursuant to the Regulations.

Appellee, on page 37, advances a novel theory that the trial court had power to override the express provisions of the statute and its regulations in any event. This is the first time that we have ever heard it urged that any court could waive or nullify the provisions of a statute conferring a right or an immunity.

In our opening brief (App. Br. 67), we asserted further error in admitting the testimony of the Internal Revenue Agents as to their conversations with each of the individual appellants, as proof of any conspiracy. Appellee attempts to answer this by stating that each of such statements were offered against the particular appellant who made it. (App. Br. p. 47.) This was true as to the written statements which the trial court excluded [R. 383], but not as to the oral testimony of the agents as to what each appellant said when such written statements were being taken down for transcription by the government reporter. There was no such limitation as to the testimony of any of these Internal Revenue Agents.

A complete answer to appellee's contention that the statements of each appellant were admissible in proof of the conspiracy against all of them appears in the recent cases of *Fishwick v. United States*, 91 L. Ed. 183, 67 Supreme Court Reporter 224; and *Canella v. United States*, 157 F. (2d) 470, both decided since the filing of appellants' opening brief.

**Appellants' Motion to Dismiss Should Have Been
Granted Because the Indictment Specifies the
Wrong Statute.**

Although this point was not urged in appellants' opening brief, we believe it has sufficient grounds to merit its presentation at this time. The indictment in all of its references to the Act specified the Emergency Price Control Act of 1942, and the Maximum Price Regulations promulgated pursuant to that Act. This Act, by its terms, expired in 1943, and at all of the alleged violations took place after that date, neither that Act nor its regulations could have controlled the situation. The indictment fails to refer to the Amended Emergency Price Control Act in any single instance.

See:

United States v. Chambers, 291 U. S. 217;

United States v. Hark, 320 U. S. 531, 88 L. Ed.
290.

For this reason, appellants' Motion to Dismiss [R. 37] should have been granted.

Conclusion.

The issues are clear-cut and we again respectfully direct this court's attention to the language of the United States Supreme Court in the case of *Bollenbach v. United States*, 90 L. Ed. 318, 66 Supreme Court Reporter, 403, to the effect that "the question is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury according to the proceedings and standards for criminal trials in Federal Courts."

Respectfully submitted,

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No. 11382.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and
JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANTS' PETITION FOR REHEARING.

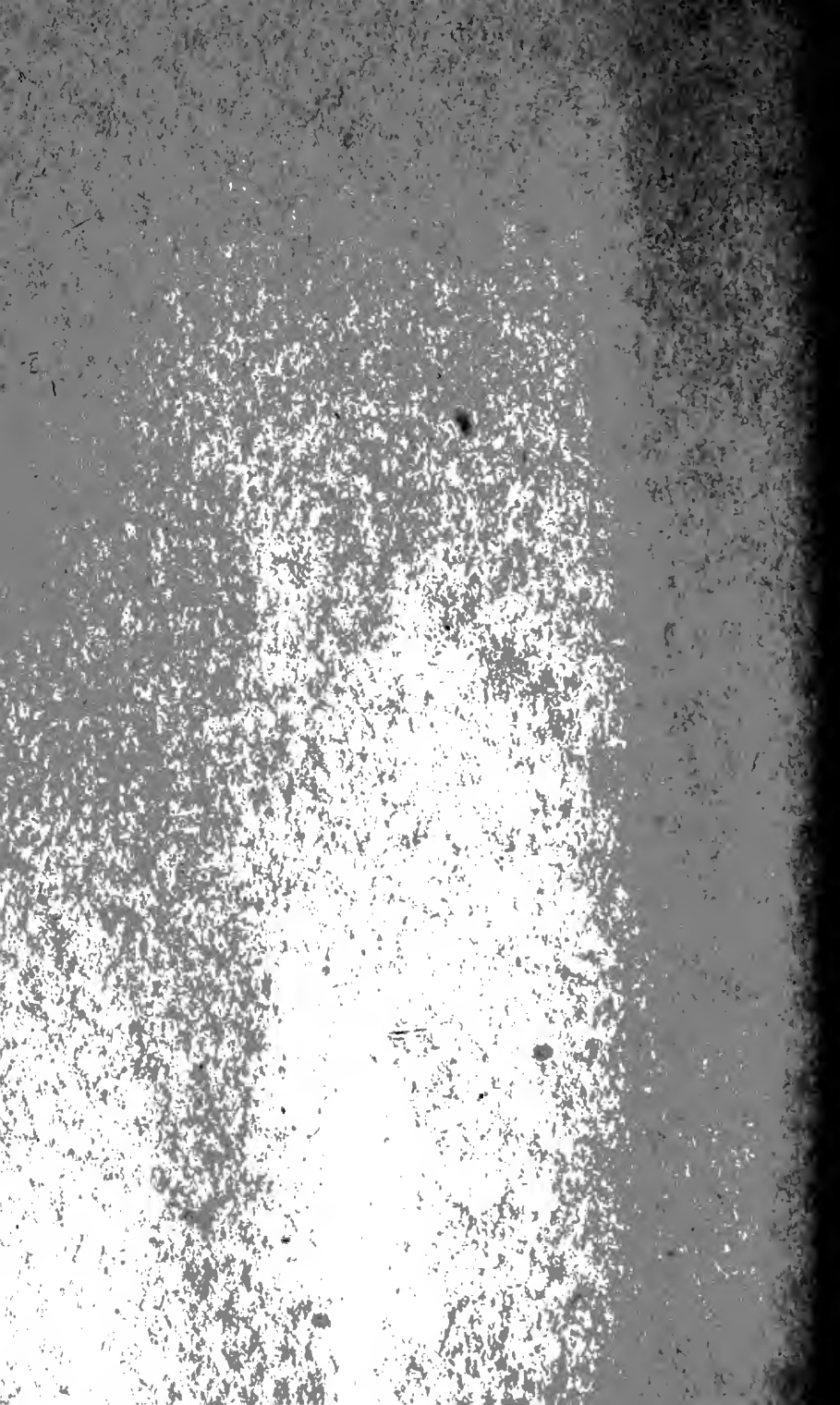
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IN THE

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Appellants,

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UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Appellants William Shubin, Frederick Alexander Shubin and Jack L. Kissel respectfully petition for a rehearing after decision rendered by this Court on the 1st day of December, 1947, affirming the judgment of the District Court of the United States for the Southern District of California, Central Division.

The grounds of such petition are as follows:

1. The decision of this Court, to the effect that there was no error in permitting testimony of a revenue agent as to oral admissions made by the appellants, even though such agent had refreshed his memory from the inadmis-

sible written transcripts of such admissions before testifying, is premised upon an incorrect concept of the record, and it disregards the provisions of the statute forbidding such testimony under any circumstances.

The opinion states:

“It is not claimed that the testimony in any manner varied from the information they possessed before reading the statements prior to testifying.”

On the contrary, appellants have always contended that when a witness makes use of an illegally obtained, and therefore inadmissible document, for the express purpose of refreshing his memory, that this vitiates his entire testimony on the subject matter. In such circumstances, the courts cannot speculate, nor can they permit the witness to speculate on what he would have remembered if he had not looked at the documents for the sole purpose of refreshing his memory. Furthermore, the oral testimony of the agents was inadmissible regardless of whether they refreshed their memories, because the statute so provides.

2. The statement in the opinion that appellants' admissions to the revenue agents were “free and voluntary,” ignores the evidence to the contrary, and disregards the trial court's error in precluding a full inquiry into whether appellants had voluntarily made such admissions. This point is entirely independent of the preceding one, as it was not concerned with whether or not the appellants' admissions were voluntary.

3. The admissions which the revenue agents testified to were admissions of the individual appellants separately made by each out of the presence of the other, and were in no sense partnership admissions as this Court seems

to imply by the following statement: "There is no force to the contention that because the operations of the individual partners were so interwoven with the operations of the partnership that in dealing with partnership affairs actions of the individuals were unavoidably disclosed and hence the whole affair should be clothed with secrecy, otherwise the income tax returns of the individual partners would be made public." This point is likewise independent from both of the preceding ones.

I.

The Rule Prohibiting the Use of Illegally Obtained Documents Must Necessarily Include Any Use in Obtaining a Conviction.

This Court in its opinion says:

"The agents used the statements made by the individual partners to refresh their memories. This action it is claimed rendered their testimony incompetent on the oft-repeated ground that individual partnership income tax returns were being introduced into evidence in a roundabout way. The information testified to by the revenue agents was known to them at the time the admissions were made. It is not claimed that the testimony in any manner varied from the information they possessed before reading the statements prior to testifying."

As we understand this, it would have been error if it had been shown that the agent *actually did refresh his memory*, but that it is not sufficient to show that the agent *read them for the purpose of refreshing his memory*. Regardless of the basis for such a distinction, we wish to point out that appellants were prevented by the trial court

from ascertaining the extent to which the agent Bircher had refreshed his recollection by reading the written statements of appellants.

The trial court permitted appellants' counsel to examine Mr. Bircher on *voir dire* and the record of this shows that he had read all three of the appellants' statements before testifying. Some examples of this are quoted on pages 33, 34, 38 and 39 of Appellants' Opening Brief.

As to William Shubin, he testified:

“Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you? A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them? A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or three days? A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon? I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

“Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, Your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have any other questions. [R. 400-401.]

As to Frederick Shubin, he testified:

“Q. Before you came to court this morning did you look at the statement of Frederick Shubin? A. Yes; I reviewed them all last night casually.

Q. Well, when you say ‘casually’ do you mean you read them or you did not? A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them? A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? A. Yes.” [R. 418-419.]

As to Jack Kissel, he testified:

“Q. By Mr. McLaughlin: Mr. Bircher, at that time there was transcribed a statement of the questions and answers, was there not? A. That is correct.

Q. And you have that statement? A. Yes.

Q. And did you look at it this noon? A. Yes, casually. I mean I didn’t read it fully.

Q. Well, how long did you spend looking at it? A. Probably three minutes to five minutes.

Q. Did you look at it before you came to court this morning? A. Yes; last night.

Q. Did you read it through last night? A. No. I haven’t read it through, I don’t think, in months.

Q. Well, how many months? A. Well, it is about eight months, I guess.”

* * * * *

“Q. Then, it was after this time that you made your report of the income tax. Did you also read it after you received the letter from the Commissioner of Internal Revenue? A. Yes; that is right.

Q. The reason that you read it, the reason that you looked at the statement on this occasion and the reason that you looked it over last night was to refresh your recollection, wasn’t it? A. Yes.” [R. 424-426.]

The vice of permitting such testimony after the witness has refreshed his recollection from an illegally obtained document is the impossibility of his, thereafter, being able to accurately state all that he knew before he refreshed his recollection. This is doubly true where this witness has made a habit of periodically reading these statements. How could he possibly be able to know how much he would have remembered at the time of the trial if he had not con-

stantly been fortifying his memory by rereading these statements? It is like asking a lawyer how much law he would have remembered if he had retired from the practice ten years ago.

The courts should not have to speculate on whether or how much such rereading refreshed the witness' memory. This is particularly true where the witness had read the statements on several occasions since they were given. The effect of this was to keep his memory refreshed regardless of what his purpose was in reading them. The obvious and admitted purpose in rereading the statements was to refresh the memory. It was not mere curiosity or love of literature which prompted such constant rereading. If the witness knew everything that was in them he wouldn't have been curious.

The only safeguard in such instances is to automatically disqualify the witness who has made any use of such inviolate documents. Here, the statute prohibits the testimony of these agents in any event, and the Commissioner of Internal Revenue has no power to waive its provisions.

Even though he had not read, or refreshed his recollection from, the returns Mr. Bircher's testimony was nothing more than an oral statement of appellants' admissions which had been transcribed and filed as supplemental returns. Under such circumstances he had no more right to testify to such than the government had to introduce the written transcripts. Neither had Mr. Eustice any right to testify to facts he ascertained in preparing his reports to the Internal Revenue Office.

The trial court properly held the written transcripts inadmissible because they had not been obtained pursuant

to the Treasury Regulations. It held that the Commissioner of Internal Revenue had no power to waive compliance with such regulations.

This Court has not ruled to the contrary, but it has overlooked the fact that the Commissioner had no power to permit his agents to give oral testimony either.

The testimony that Mr. Bircher gave was what he heard when these written statements were being given before his shorthand reporter for transcription. [R. 267-271 and 372-373.] Mr. Eustice testified that his interviews with appellants were to enable him to prepare a report to the Internal Revenue Department and file it in connection with their returns. [R. 318 and 344.] Suppose that appellants had come into the Internal Revenue Office to have an agent help prepare their original returns, could the rule as to secrecy be circumvented by having the agent testify to what they told him to put down on such returns?

We do not need to speculate on the answer to this because the statute not only precludes the use of returns and of supplemental returns such as these written statements and Mr. Eustice's report, but it prohibits the agents from orally disclosing anything that is a part of these.

Subdivision (f) (1) of Section 55, U. S. C. A., Title 26, provides:

"It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit

any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law;”

This section does not authorize any government official to permit the agents to divulge such matters orally. The only section vesting any such authority is Subdivision (a) (1) of Section 55, and this is confined to the use of written returns and reports.

Subdivision (a) (1) of this Section 55, provides:

“Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.”

All the applicable Treasury Regulations are set forth on pages 27 to 29 of Appellants’ Opening Brief and there is nothing in them permitting such oral testimony from the revenue agents. If they had attempted to do this, they would have gone beyond the provisions of the statute.

The further reason that the oral testimony of the agents was inadmissible was that neither the Attorney General’s request to the Commissioner nor the Commissioner’s written permission included any reference to these appellants or to their returns. [R. 273, 311 and 312.] This is why the trial court excluded the written statements, and for each of the reasons herein set forth, it should have excluded the oral testimony of these agents. (See references to the record on this phase of the case on pages 30, 31 and 53 to 63 of Appellants’ Opening Brief.)

II.

The Record Shows That Appellants' Statement to the Internal Revenue Agents Were Not Free and Voluntary but Were Qualified in Each Instance.

Under the preceding subdivisions we have demonstrated that the agents were precluded from testifying even though the appellants' admissions were free and voluntary, because the statute prohibits such. Furthermore, even if the statute had intended to permit such testimony pursuant to an applicable Treasury Regulation if there was such (which there is not), the government counsel never requested the Commissioner to permit their testimony as to any of these three appellants. [R. 273-274 and 277-279.]

Assuming that there is any answer to our argument thus far, we come now to the question whether appellants did waive their statutory immunity from such evidence. Before discussing this point we wish to emphasize that nothing in this Section 55 of Title 26, U. S. C. A., nor nothing in the Treasury Regulations permits the taxpayer to waive strict compliance with such statute and regulations. Assume, however, that he could waive it, did any of these appellants do it?

Mr. Bircher testified to nothing except what he heard when these statements were being transcribed by his reporter. [R. 267-270 and 372-376.] He testified that he advised appellants fully as to their constitutional rights to refuse to answer any of his questions. The appellants do not dispute this, but they contend that in spite of this admonition, they understood that their answers would not

be used in any O. P. A. proceeding or investigation involving them.

Mr. Bircher does not expressly admit or deny this. He says:

“Yes, at one of those conferences there was some discussion off the record but where that occurred it shows on the transcribed record, and that was in connection with the advice of their attorneys regarding their admonition. That is the only conversation that occurred off the record.” [R. 375.]

Appellants sought to show that prior to the giving of their statements their tax counsel had obtained the assurance from Mr. George D. Martin, the Internal Revenue Agent in Charge of the Los Angeles office, that the information given by appellants would not be used against them in any O. P. A. litigation. The trial court refused to permit such testimony. [R. 460-462.]

The trial court, likewise, refused to permit Mr. Brady to testify as to his prior discussions with Mr. Bircher regarding this matter. [R. 463-464.] It relaxed its ruling slightly after government counsel had gone into the question, but only to permit Mr. Brady to state his understanding with Mr. Phoebus at the time appellants signed their transcribed statements.

His testimony on this is as follows:

“Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it A. Mr. Bircher was there in the early part of the morning.

He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: 'It is the understanding, is it not, that these are for the eyes of the Treasury Department only?', and he answered, to my recollection, 'Yes.' "

Mr. Eustice testified to admissions that appellants had made to him when he was at their plant checking their records. He admits that he never cautioned appellants that their answers might be used against them. His testimony in this respect was as follows:

"Q. By Mr. McLaughlin: Mr. Eustice, on any of the conversations that you had with any of the defendants at this place of business, did you tell them that what they told you might be used against them in any criminal proceedings? * * *

The Witness: Yes, sir. I don't recall at any time.

Q. By Mr. McLaughlin: You have no recollection of ever having cautioned them that the things that they told you might be used against them in some proceeding brought by the government? A. No; not regarding these particular items. Whenever they came up, I just asked the questions which I was authorized to do.

Q. Yes. A. In an income tax investigation, I didn't warn them at every time that that might be used in another investigation.

The Court: Now, you qualified that. You say you did not warn them every time. Did you warn them at any time? That is what counsel is interested in. Did you warn them at any time?

The Witness: I didn't warn them at any time."
[R. 357-358.]

Both the agents, Samuel J. Phoebus and Walter E. Schlick, who had assisted Mr. Eustice, testified that they had given some assurance to appellants as to the inviolate character of testimony for the government but upon being called by appellants' counsel, they testified as follows:

"Q. Now, state what was said. A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the O.P.A. and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to the things which he was telling us unless I was authorized to do so." [Phoebus, R. 449.]

"Q. Will you state what you said and what they said as near as you can? A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the O.P.A. officials.

"We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department." [Schlick, R. 452.]

It is not appellants' contention that these agents could waive the provisions of any statute or regulations. Ap-

pellants contend that neither the Internal Revenue agents nor appellants could waive any such provisions. The government contends that appellants could and did waive their immunities. Appellants contend that, even if they had the power to waive such immunities, that such waiver would have to be clear, unqualified and unconditional. There is no evidence of such a waiver that meets the requirements stated in *Johnson v. Zerbst*, 304 U. S. 458 at 464; and *Glasser v. United States*, 315 U. S. 60.

III.

The Fact That the Revenue Agents Were Investigating the Partnership Returns as Well as the Individual Returns of Appellants Is of No Consequence.

This Court states in its opinion:

“There is no force to the contention that because the operations of the individual partners were so interwoven with the operations of the partnership that in dealing with partnership affairs actions of the individuals were unavoidably disclosed and hence the whole affair should be clothed with secrecy, otherwise the income tax returns of the individual partners would be made public. The agents used the statements made by the individual partners to refresh their memories. This action it is claimed rendered their testimony incompetent on the oft-repeated ground that individual partnership income tax returns were being introduced into evidence in a roundabout way.”

At the trial, government counsel contended that appellants' written statements were admissible because the revenue agents were investigating the partnership returns.

Appellants' counsel has never been able to understand what difference this would make even though it were wholly true.

We are still confronted with the erroneous admission into evidence of statements made by the individual appellants, which were obtained from the Revenue Office and testified to by revenue agents contrary to the express provisions of Section 55, U. S. C. A.

If there could be any significance to such a distinction, then we respectfully direct this Court's attention to the testimony of both Mr. Eustice and Mr. Bircher that they were investigating the individual returns of the appellants as well as their partnership returns. [R. 343-344, 375 and 405.]

Conclusion.

Regardless of whether the record shows the commission of any crime, appellants are entitled to a reversal if prejudicial error was committed in the trial court. They were convicted on evidence that should have been excluded, and the conviction should therefore be reversed.

This Court in the recent case of *Meeks v. U. S.*, 163 F. (2d) 598, in reversing a murder conviction, said at page 602:

"Apart from these three errors, it is true that there was other evidence strongly adverse to appellant which the jury may or may not have believed. However, the Supreme Court does not permit an appellate court to speculate as to what witnesses the jury would believe or disbelieve. Indeed, in view of the fundamental character of these errors *we may not affirm, even if we are 'without doubt' of appellant's*

guilt. In the recent case of *Bollenback v. United States*, 326 U. S. 607, 614, 615, 66 S. Ct. 402, 406, 90 L. Ed. 350, that Court, in reversing on an error in the trial court's instruction, stated '* * * In view of the Government's insistence that there is abundant evidence to indicate that Bollenback was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that *the question is not whether guilt may be spelt out of a record*, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * * From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' *if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.* In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.' (Emphasis supplied.)"

We respectfully submit that for the reasons stated a rehearing should be granted.

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Attorneys for Appellants and Petitioners.

Certificate of Counsel.

The undersigned counsel for the appellants and petitioners above named hereby certifies that in his judgment the foregoing petition for rehearing of the above named appellants is well founded and that such petition is not interposed for delay.

JAMES A. McLAUGHLIN.



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING
and
BRIEF IN SUPPORT OF PETITION FOR REHEARING

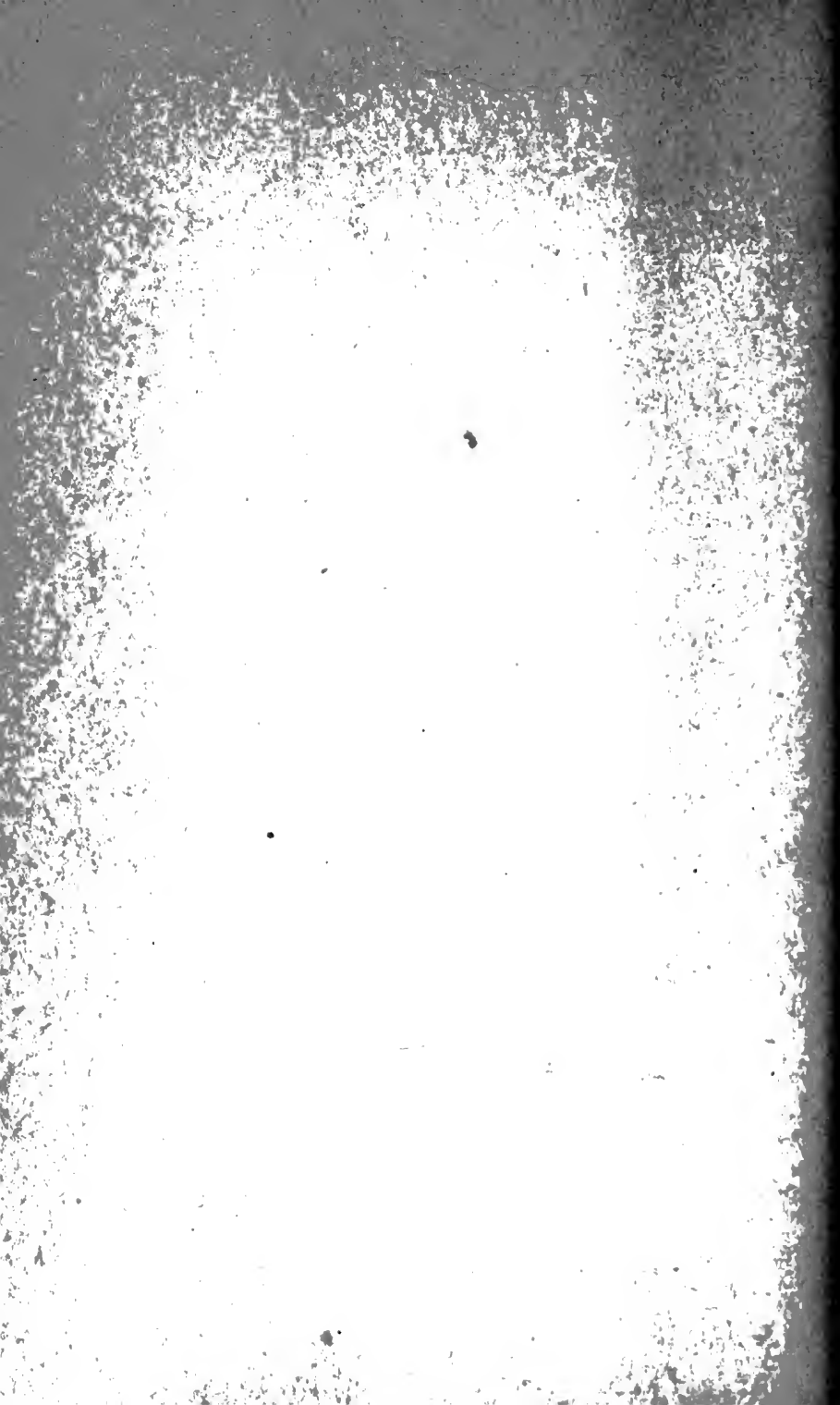
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H. SYLVESTER GARVIN,

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FILED
JUL 16 1947



**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
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**PETITION FOR REHEARING
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955 Dexter Horton Building,
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IN THE
UNITED STATES
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FOR THE NINTH CIRCUIT

ANNE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

*To the Honorable Francis A. Garrecht, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now, ANNE JOHNSON, appellant in the above
entitled cause, and respectfully petitions the court
for a rehearing in said cause and in support thereof
represents:

1. The court misread and misapprehended certain facts in the record in a material way.
2. The court decided the case according to wrong principles.
3. The court's decision is in conflict with other authorities.

Respectfully submitted,

H. SYLVESTER GARVIN,

ANTHONY SAVAGE,

Counsel for Appellant.

I. ANTHONY SAVAGE, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

ANTHONY SAVAGE,

Counsel for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Introduction

The infrequency with which petitions for rehearing have been granted seems calculated to persuade an appellate court that they are filed for the sake of form only, and merely with the hope, rather than any expectation, of their being granted.

Yet counsel for the appellant feel that certain facts in the case have been so misapprehended that an injustice has been done their client. Further, they are persuaded that the court has established a new standard in the matter of arrest, search, and seizure of a person's home.

Naturally counsel realize and appreciate the delicacy of their position. A too forceful presentation might easily be construed as lacking in that degree of respect due a court of high dignity; yet, on the other hand, "too much nicety would destroy the true effect of the points under consideration." May we declare at the outset that no word shall pass which has for its purpose any reflection on the court; and if there be any so loose that it offend, let it be ascribed to inadequacy of language.

ARGUMENT

I.

From the court's recital of the "substantial evidence in support of the factual situation" it appears that certain facts have been misapprehended.

Most important of all are the court's statements, "There were sounds of someone *scurrying around* for *several minutes* after which the officer was admitted, and "Before admission, there ensues *some minutes* of *scurrying within*."

Not a single witness testified at any time that there were sounds of someone scurrying within and no one testified that any noise or sound therein lasted several minutes.

According to Webster scurry means to hasten away or along. The New Standard dictionary defines scurry — to move swiftly and with rapid movement—as if with precipitate haste. Scurry carries the connotation of flight. The appellant contends, with all respect, that it is both inaccurate and unjust to place such a construction upon the testimony. Manifestly the court's decision hinges on what occurred when Officer Belland knocked—the smell alone not being sufficient. Strict adherence to the language used by the witnesses is absolutely necessary to a correct and fair decision. The appellant has the absolute right to be tried upon the record exactly as made below.

There were four officers, instead of three, at the door when Belland knocked. Belland testified he knocked and in response to an inquiry gave his identity. He was asked to wait a minute and after doing so rapped again—he heard "some shuffling or noise" in the room and shortly after (not several minutes) the appellant came to the door and opened it (R. 39). Officer Giordano testified he heard someone say, "Just a minute" and then there was "some rustling" (R.

93). Officers Goode and Graben were at the appellant's door at the very same time, and while both testified to the conversation between Belland and the appellant, neither of them said that there was any noise in the room (R. 80, 97).

And strange to say, Officer Graben placed Officer Giordano, who testified to the "rustling," on the fire escape at the time Belland rapped (R. 97). To the same effect is the testimony of Officer Goode (R. 80, 81). So did Belland his counter affidavit (R. 13).

On June 28, 1946, Officers Belland, Graben, and Goode made affidavits in opposition to the appellant's motion to suppress. That was nearly a month before trial and the only matter for consideration and decision was the legality of the arrest, search, and seizure. Every one of those agents described the entry to the hotel and narrated what occurred thereafter at the appellant's door. Not one of them even so much as mentioned hearing any noise of any kind in the appellant's room (R. 10, 11, 12, 13, 14, 15).

The evidence should have been ordered suppressed at that hearing. The Government agents' showing included only an informer's tip and a sense of smell. The authorities are practically unanimous in holding that an informer's tip is worthless in determining the existence of probable cause. Only the sense of smell could be properly considered. The sense of smell, without more, is not sufficient to justify an arrest and an invasion of a person's home.

Taylor v. U. S., 286 U.S. 1;

U. S. v. Lee, 83 F.(2d) 195.

The opinion states that at the time Lt. Belland received the informer's tip "the officer was engaged in the arrest of another person." The record not only fails to support that statement but is directly to the contrary. Belland called the informer by phone and arranged to meet him at Fourth and Cherry Streets at 7.30 (R. 59). Thereafter he drove the informer to the Europe Hotel, waited until he had gone into the hotel and come out, drove him back to Fourth and Cherry and then proceeded to Sixth and Jackson where he got in touch with the Federal Narcotics Agents (R. 58, 59, 65). The Federal Agents knew Belland was going to contact Odekirk, the informer; they were going on *their* case, his duty was to contact Odekirk (R. 65). When Belland arrived at Sixth and Jackson, the Federal Agents had already made *their* arrest (R. 86).

Respecting the "delay for the purpose of securing warrant for arrest and search in the circumstances would have been fatal to the detection of suspected crimes," be it said that there had already been a delay of over an hour (R. 59, 72). Moreover, the appellant's room was surrounded, officers at her door, an officer on the fire escape overlooking the only window, and officers stationed below at the exit. How could anyone in the room get away? It may have inconvenienced the officers to take a little more time in obtaining a search warrant, but as the Supreme Court of the United States in the *Taylor* case, 286 U.S. 1, said a short period of watching would have prevented possibility of material change during the time necessary to secure a search warrant.

See also:

U. S. v. Kaplan, 89 F.(2d) 869.

The appellant's constitutional rights should not be suspended and held for naught whenever some difficulty arises in their observance. The Government should arrest and prosecute by fair and lawful means or not at all. *U. S. v. Read*, 42 F.(2d) 636.

II. and III.

The appellant declares that she has considerable difficulty in following the court's opinion respecting the argument of the United States Attorney. First the suggestion is made that defense counsel may have baited the United States Attorney. Then it is said that the misconduct did not constitute reversible error. Then again, that no exception was taken, nor any objection made; and since counsel for the appellant was satisfied, the appellant must suffer the consequences because the evidence "just about" demonstrated her guilt.

Truly she is in a quandary. If it is shown there was no baiting, she is confronted with a holding that there was no prejudice; and if she is able to show some measure of prejudice, then she meets the stonewall of "no objection."

In arriving at its decision the Circuit Court of Appeals apparently overlooked Rule 52, Section (b) of the Rules of Criminal Procedure, 18 U.S.C.A., following 687, which states "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

A note on that rule in the second preliminary draft declares "the concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which objection and exception were not imposed at the trial." It may be observed also in passing that the new rules of criminal procedure abolished the need for exceptions.

The court's attention is called to the case of *U. S. v. Atkinson*, 297 U.S. 157, "in exceptional circumstances, especially in *criminal cases*, appellate courts in the public interest, may of their own motion, notice errors to which no exception was taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

McCandless v. U. S., 298 U.S. 345, lays down the principle that it is, "a well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial."

Is not the true test here, did the appellant receive a fair trial? Was she well and truly tried on the evidence or did the United States Attorney throw the weight of his office against her in a disconnected, flamboyant talk mainly accusatory of her representative asserting that in his belief (and what court justifies such expressions of belief, what right or standing have counsel's personal opinions in a trial?) that he had made up, concocted the "story of the defense?" Certainly he went much further than that—accused

him of concocting a story, of testifying himself, putting the words in her mouth, and inducing the appellant to execute a false affidavit incorporating his fabrication, and even declaring that she committed perjury "in other instances in this case."

What was the purpose of such an argument if not to persuade the jury that the appellant and her counsel had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief? *Weathers v. U.S.*, 117 F.(2d) 585. Far from having no effect upon the jury, "it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations (to refrain from improper methods calculated to produce a wrongful conviction) which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *U. S. v. Berger*, 295 U.S. 629.

It is respectfully submitted that the court below committed error and that the judgment of conviction should be reversed.

Respectfully submitted,

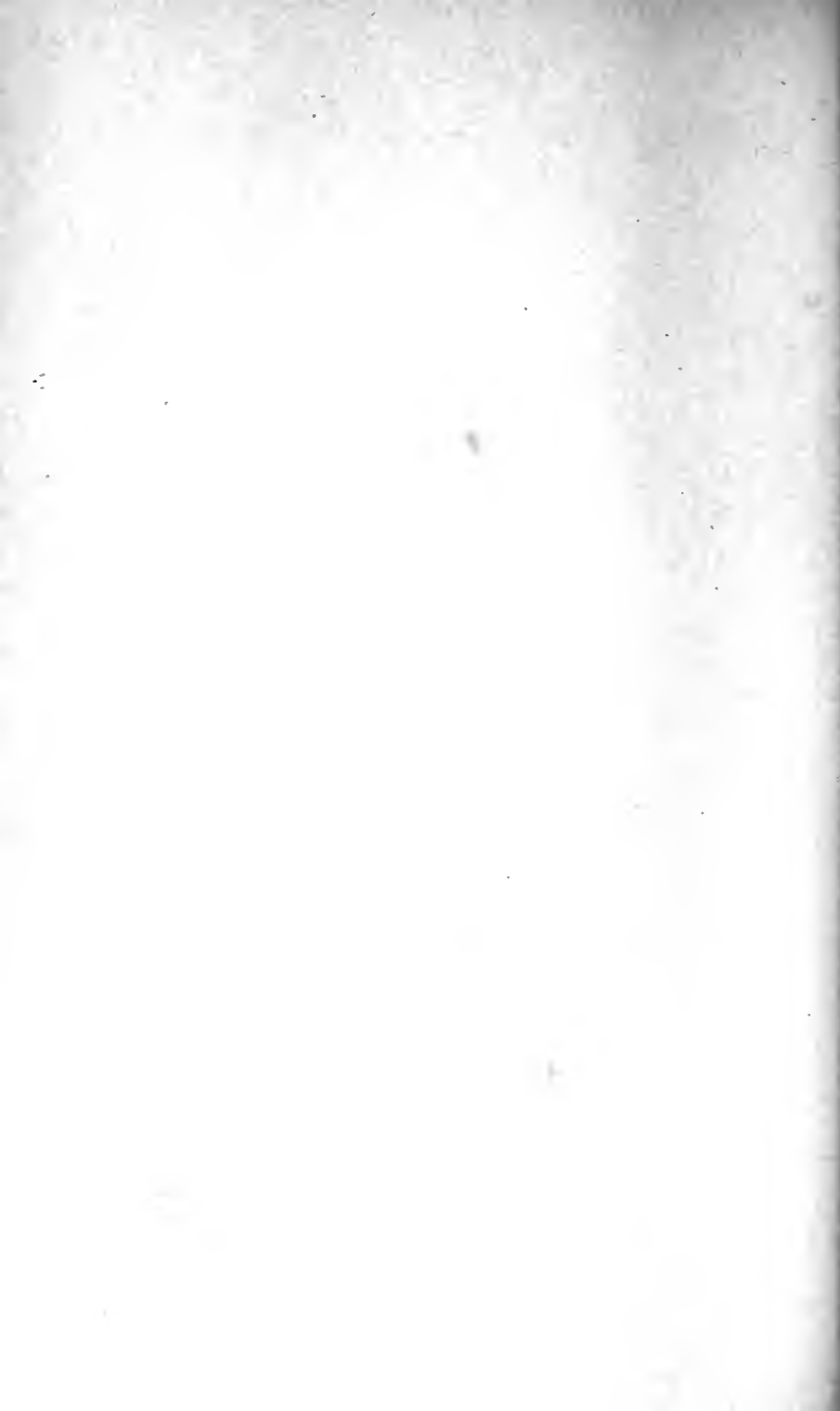
H. SYLVESTER GARVIN,

ANTHONY SAVAGE,

Counsel for Appellant.







No. 11,413

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

ELVIRA SEBASTIANI, AUGUST SEBASTIANI and
BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, Executors of the
last will of Samuel Sebastiani, deceased,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.

WILLIAM E. REMY,

Deputy Commissioner for Enforcement

DAVID LONDON,

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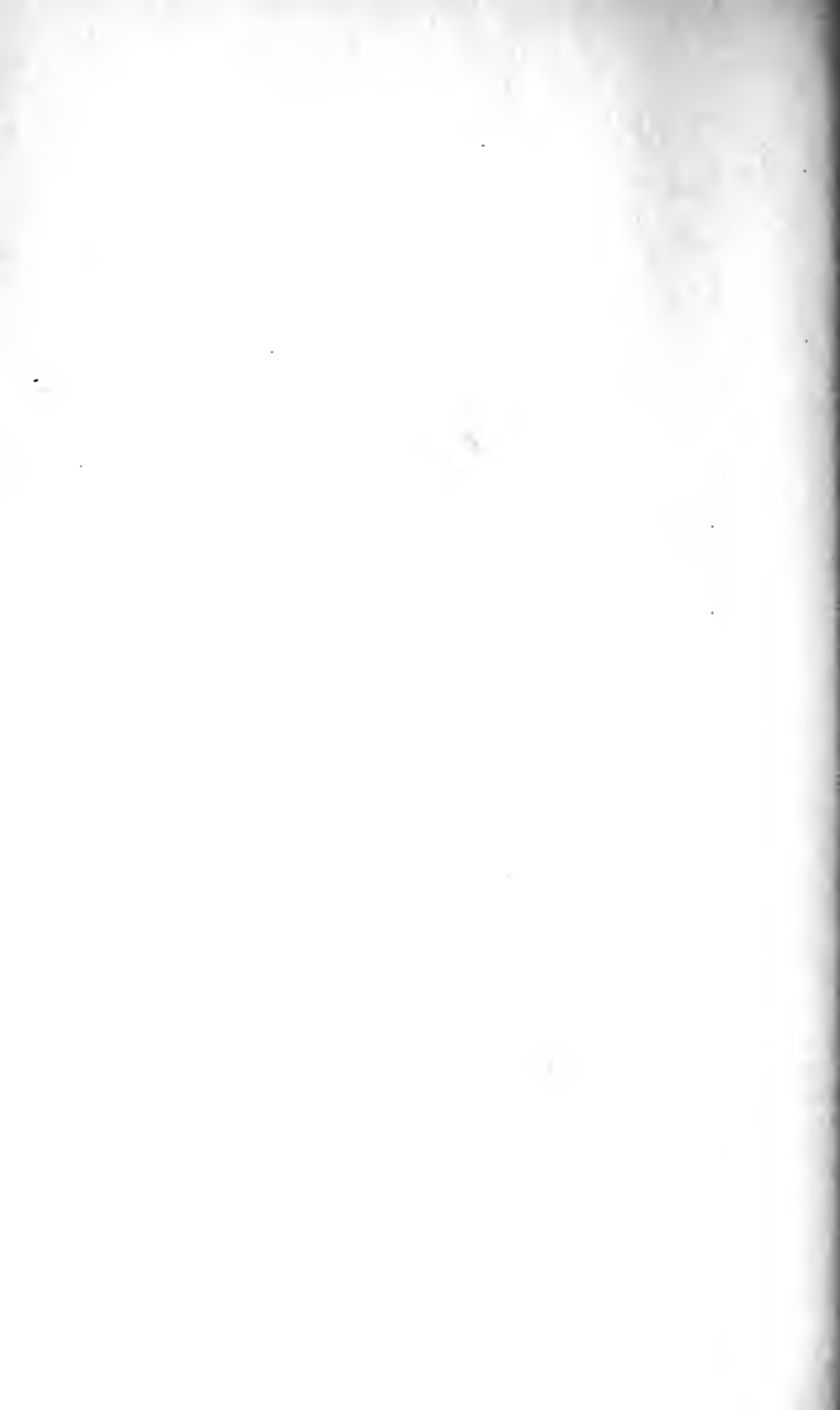
47 Kearny Street

San Francisco 8, California

FILED

MAY 1 1947

PAUL P. O'BRIEN,



IN THE

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For the Ninth Circuit

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellant,

vs.

ELVIRA SEBASTIANI, AUGUST SEBASTIANI and
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SAVINGS ASSOCIATION, Executors of the
last will of Samuel Sebastiani, deceased,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

Pursuant to Rule 25 of the Rules of this Court, the Temporary Controls Administrator respectfully petitions for a rehearing of the above entitled appeal, which was dismissed on April 17, 1947.

In dismissing the appeal, this Court held that no valid substitution for a deceased defendant could be

made more than two years after his death, basing its decision on the Supreme Court case of *Anderson v. Yungkau*, U.S., 67 S. Ct. 428 (Jan. 13, 1947). It is submitted, however, that the problem raised by the instant case was not before the Supreme Court in *Anderson v. Yungkau*. There, the plaintiff did not move for substitution until more than two years after the death; in the instant litigation, the motion was made within the two-year period, but not acted upon by the District Court until after that period had expired.

In the *Yungkau* case, it was held that even "excusable neglect" constituted no exception to the two-year limitation in Rule 25(a)(1) of the Federal Rules of Civil Procedure, and would not excuse the plaintiff's failure to move to substitute until after expiration of the two years. The decision was based on the fact that the policy behind Rule 25(a)(1) is the furtherance of prompt and orderly probate administration in the State Courts, and that the possibility of belated attempts to reopen or keep open such proceedings, in order to satisfy a claim against an estate to be adjudicated in the Federal Courts, would have a disruptive effect, *Anderson v. Yungkau, supra*, pages 430-431. And as between requiring plaintiffs to move to substitute within a specified period, and allowing such motions to be interposed for an indefinite time into the future where some excuse exists, it is clear that this policy demands that plaintiffs, at their peril, make timely motions to substitute.

But if a plaintiff makes such a motion within the specified time, and his rights can nevertheless be defeated by any of the numerous factors which might prevent the granting of substitution within the two-year period, the effect will be to defeat the very policy behind the Rule. Under the decision of this Court in the instant case, it will be to the interest of the estate to delay matters to the greatest extent possible, in the hope that by such dilatory tactics the cause of action against the estate can be effectively defeated. Efforts will undoubtedly be made in a large number of cases to hold up the appointment of the administrator or qualification of the executor as long as possible so that no party exists who may be substituted. Even after such an appointment, further dilatory tactics may be expected, in order, if at all possible, to avoid a determination within two years. Even if such efforts are unsuccessful, the attempt alone will result in at least some delay in the adjudication of the claim, and a corresponding interference with the final distribution and settlement of the estate. The "prompt and orderly probate administration" deemed by the Supreme Court to be fostered by Rule 25(a)(1), 67 S.Ct., at page 431, would thus be hampered rather than helped by the decision of this Court in the instant case.

Even where no dilatory tactics are encountered, other unfortunate consequences of this decision may be envisaged. A motion to substitute may be promptly made after the defendant's death, and the District

Court may erroneously deem the action one which abated at death and therefore deny the motion. Even if this decision be reversed on appeal, so much time may be consumed by the appellate proceedings (especially if *certiorari* is petitioned for) that the two-year period will have elapsed by the time the cause is finally remanded to the District Court, and the decision of reversal will have become a nullity. Legitimate claims will be at the mercy of fortuitous circumstances. What may well ensue as a result is a flood of attempts by understandably anxious plaintiffs to have the Circuit Courts of Appeals mandamus the District Judges to allow the substitution—a procedure disruptive of the normal appellate practice.

It may further be noted that the Supreme Court, in the *Yungkau* decision, refers to Rule 25(a)(1) as a statute of limitations, 67 S. Ct. 428 at page 431. Statutes of limitations restrict the time within which legal relief can be *requested* of a court; they do not limit the period within which the court may adjudicate the claim. This characterization of the Rule indicates that the Supreme Court's attention was directed solely to the factual situation of the *Yungkau* case—namely, the plaintiff's failure to make a timely motion—rather than to the situation presented in the instant litigation, in which the plaintiff acted within the specified time. It also offers reason for the belief that the Supreme Court regarded the Rule as merely limiting the time of *application for* substitution. Thus, while the words of Rule 25(a)(1) appear at

first blush to limit the time within which the Court may act, the Rule must be construed with regard to its underlying purpose;¹ this purpose, as shown above, is the prompt and orderly, rather than dilatory and chaotic, administration of estates. To achieve this end, and to avoid the confusion which would inevitably ensue from any other decision, it is submitted that an application by the plaintiff for substitution, made within two years, should be deemed as meeting the requirement of the Rule.

Further support for our construction of the Rule may be found in the proceedings of the Advisory Committee. That Committee last year proposed an amendment to Rule 25² which would have eliminated

¹Effectuation of the policy of legislation may govern its construction, even in the face of apparently unambiguous words. Cf., *United States v. American Trucking Associations*, 310 U. S. 534, 543-44, 60 S. Ct. 1059, 1063-64; *United States v. N. E. Rosenblum Truck Lines*, 315 U. S. 50, 55-56, 62 S. Ct. 445, 449; *Pembroke Realty & Securities Corp. v. Commissioner*, 2 Cir., 122 F.2d 252, 255.

Compare the construction of language very similar to that in Rule 25(a)(1), in Ore. L. 1862, Sec. 37, Ore. Code (1930), Sec. 1-311, by the Supreme Court of Oregon, in *Dick v. Kendall*, 6 Ore. 166. Cf., *Hudson v. Williams*, 5 Ga.App. 245, 62 S.E. 1011; *Stepanian v. Moskovitz*, 232 Mich. 630, 206 N.W. 359.

²"If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period.* If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

(Proposed amendatory language italicized; 5 F.R.D. 452-453.)

both the issue in the *Yungkau* case, *supra*, and that in the instant case. The former would be covered by an express exception in the case of reasonable excuse; the latter, by making the two-year limitation unambiguously pertinent only to the time of application. The Committee's practice has been to explain every proposed amendment which it regards as changing the pre-existing Rule, in the Notes which it submits along with the proposed amendments. The Note to the proposed amendment to Rule 25³ treats the reasons for the change covering the *Yungkau* issue, but makes no reference to the change which makes express the application of the two-year limit to the time of the motion for substitution. The inference is clear that this change of language was regarded as only declaratory in nature. The proposed amendment to Rule 25 was not passed on to Congress by the Supreme Court, presumably because the *Yungkau* case was then pending.

So far as we can discover, the instant case is one of first impression. In *Anderson v. Yungkau*, 67 S.Ct. 428, 429, the Supreme Court granted *certiorari*, al-

³“This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman v. General Motors Corp.*, S.D.N.Y. 1939, 30 F.Supp. 112; *Anderson v. Brady*, E.D.Ky. 1941, 1 F.R.D. 589, 4 Fed. Rules Serv. 25a.1, Case 1; *Photometric Products Corp. v. Radtke*, S.D.N.Y. 1946, 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson v. Yungkau*, C.C.A. 6th, 1946, 153 F.2d 685, cert. granted, 1946, 66 S.Ct. 1025.”

(5 F.R.D. 453.)

though there was no conflict among the Circuit Courts of Appeals, "because the case presented an important problem in the construction of the Federal Rules of Civil Procedure." The problem raised by the present litigation is of at least as great importance as that in the *Yungkau* case. Nor is this question one of "OPA law", it is a matter of concern in every type of litigation in the Federal Courts. Yet the issue has never been fully briefed and argued. The case was decided by the District Court and briefed by both parties in this Court without reference to this issue, which was first raised, apparently as an afterthought, in the appellees' oral argument.

For the foregoing reasons, it is respectfully urged that a rehearing be granted.

Dated, San Francisco, California,
May 16, 1947.

Respectfully submitted,

WILLIAM E. REMY,

Deputy Commissioner for Enforcement

DAVID LONDON,

Director, Litigation Division

ALBERT M. DREYER,

Chief, Appellate Branch

ABRAHAM H. MALLER,

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ALBERT J. ROSENTHAL,

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47 Kearny Street

San Francisco 8, California

CERTIFICATE OF COUNSEL.

It is hereby certified that the foregoing petition is in my judgment well founded and not interposed for delay.

Dated, San Francisco, California,
May 16, 1947.

WILLIAM B. WETHERALL,
Regional Litigation Attorney
Office of Price Administration
Office of Temporary Controls
47 Kearny Street
San Francisco 8, California



No. 11421.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARCEL RODD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

GREENBAUM, WOLFF & ERNST, and

ALEXANDER LINDEY, and

MERVIN ROSENMAN,

285 Madison Avenue, New York City 17, N. Y.,

A. L. WIRIN, and

FRED OKRAND,

257 South Spring Street, Los Angeles 12, Calif.,

Attorneys for Appellant.



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No. 11421.

IN THE
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FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

In our opening brief¹ we have contended that in order to support a conviction on the ground of obscenity, it must be established beyond a reasonable doubt that there is a "clear and present danger" that the material in question will impel the average adult reader to anti-social sexual behavior; that CALL HOUSE MADAM is not obscene by this or any other definition; that there was total failure of proof to support the charge in the indictment or that the defendant did "knowingly" and "feloniously" cause the book to be deposited with or to be taken from a common carrier; that the defendant was denied a fair trial in violation of due process; that Count One of the indictment is fatally defective; that the effect of the sen-

¹References to our opening brief are hereafter made by means of the letters A. B., followed by page numbers.

tence in the instant case is to punish the defendant twice for the same act; that there was a complete failure of proof on Count Two of the indictment; and that even if the conviction under Count Two were valid, it was error to impose a separate sentence on it. We pointed out that a careful search had not revealed a *single* case in which a defendant had been convicted, as the defendant Rodd has been, for both “sending” and “receiving” by reason of the mere act of depositing books with a common carrier.

The prosecution’s brief,² for the most part, avoids the fundamental issues raised by these contentions, and concerns itself with drawing unwarranted assumptions and innuendoes from the meager evidence.

POINT I.

“Call House Madam” Cannot Be Declared Obscene as a Matter of Law.

A. TO WARRANT A CRIMINAL CONVICTION, THE PROOF OF OBSCENITY MUST BE “BEYOND A REASONABLE DOUBT” AND NOT “BY A REASONABLE JUDGMENT” AS THE PROSECUTION CONTENTS.

It is axiomatic that a criminal conviction must be on the basis of evidence which proves guilt beyond a reasonable doubt. (*Wilson v. United States*, 232 U. S. 563; *Wigmore on Evidence*, 3rd Ed., Sec. 2497, and cases cited therein.)

²Reference to the prosecution’s brief are hereafter made by means of the letters G. B., followed by page numbers.

The elements of the crime³ charged here are (a) knowingly; (b) depositing or causing to be deposited for interstate carriage; (c) an obscene book. The prosecution argues by inference that (a) and (b) were proven beyond a reasonable doubt. Yet on (c) it urges⁴ a test of only "reasonable judgment." In effect, it insists that even if this Court were to say that the unlawful character of CALL HOUSE MADAM had not been established beyond a reasonable doubt, the conviction below could not be reversed if the Trial Court could have, by a "reasonable judgment" found it obscene. The unsoundness of this position needs no belaboring. It is true that the determination of an administrative agency or the verdict in a civil case (to take two examples) will be given that sort of review. (*Cf. Lilienthal v. United States*, 97 U. S. 237.) But in a criminal case such as the one at bar, where every material element is to be proven beyond a reasonable doubt (Wharton, Criminal Evid., 11th Ed., Sec. 196), that sort of review is impossible.

The more recent Circuit Court opinions will, on analysis, show the "reasonable judgment" test to be fallacious. In *United States v. One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2), the Court formed its own opinion and spent almost three pages discussing the book *de novo*, merely referring to the opinion below (5 Fed. Supp. 182) in ten lines summarizing the proceedings at trial. In *Parmelee v. United States*, 113 F. (2d) 729 (C. A. D. C.), the Appeals Court's opinion runs for over eight

³As we show, *infra* Points III and IV, Count Two relating to "taking" from the carrier is not a separate crime in the case at bar.

⁴G. B. 7-8.

pages with a sixteen line summary of the findings of the Trial Court on obscenity in the statement of facts. And these cases were civil libels under the Tariff Act, 19 U. S. C. A., Sec. 1305(a). The principle we urge—that this Court must be satisfied beyond a reasonable doubt of the illegality of CALL HOUSE MADAM—applies *a fortiori* to the review of a criminal conviction.

Indeed, this Court in *McKnight v. United States*, 78 F. (2d) 931 (C. C. A. 9) formed its own opinion on the allegedly scurrilous nature of the post-cards in question before reversing the decision below. That is all we say should be done in the case at bar. And if this Court were to find that no clear and present danger existed that CALL HOUSE MADAM would impel average adults to anti-social sex behavior, it is clear that it is impossible for the Trial Court to have found proof of obscenity beyond a reasonable doubt.

B. NO EXTRINSIC PROOF OF OBSCENITY WAS OFFERED.

The prosecution's sole reliance is on the book itself. Admittedly, the record here is bare of any extrinsic proof of obscenity.⁵ If anything, the record is the other way

⁵The prosecution concedes, as used in Sec. 396, "lewd," and "lascivious" are really synonyms for, and add nothing to, "obscene." But it contends (G. B. 13) that "filthy" adds new meaning since it encompasses "dirty" or "nasty" matter. Assuming for purposes of argument that this is true, "filthy" would mean scatology. The citations in its brief (G. B. 13) bears this out. *United States v. Limehouse*, 285 U. S. 424 involved letters containing foul language, and *Tyomies Publishing Co. v. United States*, 211 Fed. 385 (C. C. A. 6) involved a picture illustrating a book, which picture was the equivalent of the French postcard, or ordinary smut. It cannot be seriously contended that CALL HOUSE MADAM, which contains no illustrations whatever, is "filthy" due to scatology. Therefore the sole question is its alleged obscenity.

[R. 10-12]. As we have pointed out in our opening brief (A. B. 14), there has been no evidence of undesirable social consequences in the field of sexual behavior arising from the reading of the book. It was in general circulation for four years prior to the defendant's conviction. It was openly sold throughout this country by reputable agencies. It has not been shown to have corrupted or depraved any adult readers by impelling them to anti-social sexual acts. Nor has it been established that there is a "clear and present danger" that it will do so. Obscenity is perhaps the only field in the entire body of criminal law where until the recent Supreme Court decisions cited in our main brief (A. B. 12-14; see also heading D, *infra*), no extrinsic proof was required of the prosecution on a vital element of the alleged crime. Even the doctrine of *res ipsa loquitur*, which comes closest to it, is historically only a presumption of culpability in civil cases, which is rebuttable by evidence. This is due in part at least to the fact that proof as to the true cause of the injury is usually accessible to the party against whom the doctrine is invoked and inaccessible to the injured party. (Wigmore on Evidence, 3d Ed., Sec. 2509; Prosser on Torts, 1941, p. 301.)

The prosecution insists that intrinsic evidence is enough—that a mere reading of CALL HOUSE MADAM is enough to convince this Court that the Trial Judge's decision should be affirmed. It argues (G. B. 8) that the Judge below sat as a jury and by inference was as competent to make that intrinsic appraisal as a jury would have been. This is legal fiction, nothing more. The essence of a jury trial, both realistically and historically, is that the jury, being composed of men drawn from the various

segments of the general public (*Commonwealth v. Isenstadt*, 318 Mass. 543, 559), can appraise the probable impact, on the average adult reader, of the material under attack. A judge is not a cross-section of the community; and the waiver of a jury trial cannot make him so.

C. OBSCENITY MAY NOT BE DETERMINED ON THE BASIS
OF ISOLATED PASSAGES.⁶

The prosecution concedes (G. B. 13) that recent Circuit Court decisions require the reading of a book as a whole. This is correct. (*United States v. One Book Called Ulysses*, 72 F. (2d) 705, 707 (C. C. A. 2); *Parmelee v. United States*, 113 F. (2d) 729, 737 (C. A. D.C.).) It pays lip service to the law by urging that this be done (G. B. 15), and then proceeds to indulge in the very practice which the courts have repeatedly condemned. (See Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40.) It plucks isolated passages out of context, and tries to focus attention on them (G. B. 16 *et seq.*). By its own admission it would have been improper for the prosecution to offer the Trial Judge a copy of the book with marked passages. It would be equally improper to give such marked copies to this Court on appeal. We feel confident that this Court will examine CALL HOUSE MADAM without regard to the prosecution's improper finger-pointing. "The problem is to be solved not by counting passages but rather by

⁶In *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1, the Court of Appeals said: "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole."

considering the impressions likely to be created.” (*Commonwealth v. Isenstadt, supra*, at p. 549, “Forever Amber.”)

D. A CONVICTION IN AN OBSCENITY CASE NECESSARILY ENTAILS THE SUPPRESSION OF THE BOOK IN QUESTION, AND INVOLVES THE FREEDOM OF THE PRESS. THE COURTS MUST BE ALL THE MORE VIGILANT IN REQUIRING PROOF BEYOND A REASONABLE DOUBT.

As we have shown (A. B. 12-14), the “clear and present danger” test developed by the United States Supreme Court must be applied in determining whether a book is obscene beyond a reasonable doubt. We have also shown that when the test is applied to *CALL HOUSE MADAM*, no justification exists for conviction.

The prosecution says this test cannot be applied. Faced with the clear and explicit utterances of the Supreme Court, it puts forward a new theory. It insists that obscenity statutes were intended to dry up the “streams” which, if allowed to accumulate, would back up behind the dam of morality and ultimately breach it. It argues that since *CALL HOUSE MADAM* deals with sex in its least attractive aspects, it is one of the streams that must be dried up. The prosecution does not pause to inquire whether this is a roaring stream or a bare trickle. Nor is it daunted by the fact that its metaphor is a pure assumption unsupported by anything in the record.

The prosecution’s theory flouts reality as well as the law. It ignores the moral stamina of the average adult. It overlooks the myriad sexual stimuli which confront the adult daily in the form of newspapers and magazines, books, plays, motion pictures, paintings, statuary, store

displays, advertising, and, most important, the presence of persons of the other sex. Furthermore, the theory ignores the fact that the Supreme Court in recent years has repeatedly and emphatically struck down every attempt to suppress free speech and press in cases where the attempts were predicated, by implication, on just such stream-and-dam arguments as the prosecution has here advanced.

In order to warrant suppression it is not enough that the material have a "reasonable tendency" to harm. Even a "dangerous tendency" is not sufficient. For, as this Court recognized in *McKnight v. United States*, 78 F. (2d) 931, 932 (C. C. A. 9) this type of offense against the mails (and, by necessary implication, against interstate commerce by carrier) is highly penal. (*Swearingen v. United States*, 161 U. S. 446.) Therefore, since freedom of the press is involved, obscenity must be proven beyond a reasonable doubt: it must be shown that there exists a "clear and present danger" of the occurrence of anti-social sexual behavior unless the book is suppressed. "What finally emerges from the 'clear and present danger' cases is a working principle that the substant of evil must be extremely serious and the degree of imminence extremely high * * *." (*Bridges v. California*, 314 U. S. 252, 263.)

In *Bridges v. California*, *supra*, the defendants published acrimonious comment on pending litigation. One defendant advised a California Trial Court to send certain persons to jail rather than put them on probation, and threatened adverse criticism in the future if this were not done. In a telegram the other defendant Bridges characterized a Trial Court's decision in a labor dispute

as “outrageous” and said that its enforcement would be met by a strike which would tie up West Coast shipping. The defendants were convicted of contempt of court. The highest court in California affirmed the conviction on the ground that the defendants’ utterances had had a “reasonable tendency” to interfere with the orderly administration of justice and to cause a disrespect for the judiciary—words suspiciously reminiscent of the prosecution’s stream-and-dam argument here. Were not the diatribes of the appellants in the *Bridges* case “streams” of disrespect which, if swelled by similar streams, would break down the dam of public esteem for the law? Yet the Supreme Court held that no clear and present danger had been shown, and reversed the convictions.

In *Cantwell v. Connecticut*, 310 U. S. 296, the same result was reached. There the defendant had played victrola records attacking the Catholic religion. Persons testified that they had been deeply offended thereby and had felt like striking the defendant. The defendant was convicted of common law breach of the peace. Here, too, there was a “stream” of abuse which, if permitted to multiply and gather behind the dam of restraint, might burst and result in wholesale breaches of the peace. Yet the Supreme Court held that the constitutional guaranty of free speech and religion would not allow the suppression of the defendant’s views.

The display of a red flag as a symbol of Soviet Russia and the Communist Party of the United States may well be considered a “stream” in the flow of opposition to our form of government. Yet the Supreme Court, in *Stromberg v. California*, 283 U. S. 359, held that the “stream” could not be dried up. Surely a “malicious, scandalous

and defamatory newspaper” which made grave accusations of laxity against public officers in connection with the prevalence of crime, was a “stream” tending to destroy public faith in law enforcement. Adhering to its clear-cut policy, the Supreme Court nevertheless held that such a newspaper could not be suppressed as a nuisance. (*Near v. Minnesota*, 283 U. S. 697.)

It is unnecessary to multiply examples. Basically the prosecution’s theory stems from its belief that *CALL HOUSE MADAM* is not a good book, possibly even an unpleasant one. However, that does not make it obscene or justify its suppression. As Mr. Justice Holmes said in dissenting in *Abrams v. United States*, 250 U. S. 616, 630:

“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.”

There was no showing below that *CALL HOUSE MADAM* presents a clear and present danger to the morals of the community. It should be exonerated.

POINT II.

The Prosecution's Contention as to the Sufficiency of Count One of the Indictment Ignores the Safeguards Provided by the United States Constitution.

The prosecution argues (G. B. 24) that vital matters of substance are mere procedural questions of jurisdiction and venue, and need not be stated in the indictment nor proven at the trial. It says that the place where the crime charged in Count One was committed need not be alleged; that even if it were required, the defendant waived the defect by going to trial; and that in any case, the defendant can prevent double jeopardy in the future by resorting to parol evidence. This argument flies in the face of the Sixth Amendment to the United States Constitution which requires that a defendant be apprised of the crime of which he is accused. It also runs counter to the double jeopardy provisions of the Fifth Amendment.

A. THE INDICTMENT ITSELF IS FATALLY DEFECTIVE.

The defendant herein was *not* charged with depositing. The indictment accuses him of *causing* the deposit [R. 2]. However, the indictment specifies neither the place of deposit of the books with the carrier, nor the place where the defendant allegedly caused the deposit to be made. It merely charges that the carriage was to be from Brooklyn, New York, to San Diego, California. Assuming that this Court holds that the point of deposit may reasonably be inferred to be the place of the origin of the shipment, *the place where the defendant did the things that caused the deposit* is still nowhere set forth. We maintain this is a fatal defect.

There is still another substantive defect arising from Count One. Since the indictment does not state the place where the defendant did the things that caused the deposit, the proper place of trial cannot be determined. Therefore defendant Rodd cannot be tried for that crime in California merely because the Government arbitrarily decided to try him there. We conceded in our main brief (A. B. 26) that there was no question of venue arising from the transfer of the cause from the Southern Division of California to the Central Division thereof. But there is a substantive defect arising from a trial at a place in which no acts of the defendant took place. It may be that in the ordinary criminal case the question can be waived by going to trial. But we insist that there can be no such waiver in a case involving freedom of the press, since suppression of CALL HOUSE MADAM will result from a conviction. As we have pointed out (*supra*, Point I-D), the Supreme Court has repeatedly recognized that special considerations govern, and a much higher standard of proof is required, in a case in which the First Amendment is involved. Hence no waiver of venue could have any effect in the case at bar where the place of crime is not specified, even though no objection was made prior to trial.

The cases cited in the prosecution's brief are not in point. They are addressed to venue and not to defect of substance. *Hagner v. United States*, 285 U. S. 427 (G. B. 25), concerned primarily the proper place of trial, and therefore it is not relevant. Moreover, the indictment there clearly stated that the fraud letter had been placed in the Post Office in Scranton, Pennsylvania, to be delivered at Washington, D. C. The place of the commission of the crime was specified, and the Supreme

Court merely presumed receipt of the letter from the proper mailing.⁷ *Brown v. Elliott*, 225 U. S. 392 (G. B. 26) also involves the question of venue and not the sufficiency of the indictment.

Nor can the defective indictment here be explained by analogy to conspiracy. It is clear in *Brown v. Elliott*, *supra*, that without an overt act there could have been no conviction for conspiracy to use the mails to defraud. So the place of the overt act not only determined venue but established the substantive criminal act. Since the indictment specified that the overt act took place in Omaha, it was properly held to be sufficient. In the case at bar, however, the indictment does not specify the place where the defendant *caused* the books in question to be deposited, which—in distinction to the place of deposit—was the place of the crime.

The prosecution also argues that indictments similar to the one *sub judice* have been held sufficient by this Court. This is not so. The indictments in the cases it cites (G. B. 27) did specify to some extent the place of crime. In both *Fiddelke v. United States*, 47 F. (2d) 751 (C. C. A. 9) and *Parmagini v. United States*, 42 F. (2d) 721 (C. C. A. 9), the date and city where the alleged offense took place were indicated; in *United States v. Busch*, 64 F. (2d) 27 (C. C. A. 2), cert. den'd 290 U. S. 627, the indictment stated that the crime was committed "at the Southern District of New York and within the jurisdiction of the Court." In the instant case, not even this

⁷It is significant that in the *Hagner* case there was no additional count for "taking" the letter from the mails even though the trial was held at the place where the letter was delivered, to-wit: Washington, D. C.

much is set forth. Under the indictment as drawn, the defendant could have caused—by mail, telephone, telegraph or word of mouth *in any one of the 48 states*—the deposit with the carrier in Brooklyn. This is not what the Fifth Amendment envisages as protection against double jeopardy.

The defendant did not waive the insufficiency. He moved to dismiss the indictment at the trial [R. 7], and subsequently moved for a new trial [R. 17]. However, the fatal defect, being one of substance, was not subject to waiver in any event (A. B. 28, 29).

B. NOR WAS THE DEFECTIVE INDICTMENT CURED BY EVIDENCE PRODUCED AT THE TRIAL.

As we have shown in our main brief (A. B. 30-31), evidence produced at a trial is not relevant on the legal sufficiency of an indictment. But even if it were, the evidence which was presented in this case did not cure the defective indictment. In the *Fiddelke, Parmagini* and *Busch* cases, *supra*, any uncertainty latent in the indictment was dispelled after trial. In the case at bar the stipulation of July 23, 1946 [R. 8-10] was the only evidence on this point, and it does not mention the place of crime charged in Count One.

The cases cited by the prosecution (G. B. 26) on the role of evidence as to the *means* of causing a deposit to be made in the mails, are not apposite. Both *Graham v. United States*, 120 F. (2d) 543 (C. C. A. 10) and *Smith v. United States*, 61 F. (2d) 681 (C. C. A. 5) involved the question of whether the indictment must specify the particulars of the scheme by which the letters were caused

to be deposited in the mails; in both cases it was properly held that this was evidence to be adduced at trial. Neither case involved the *place* of the crime.

The conviction on Count One should be reversed, and the indictment to that extent dismissed.

POINT III.

A Single Criminal Act Cannot Be Split Into Two Offenses. The Defendant Cannot Be Punished Both as Consignor and Consignee Merely by Virtue of Being Consignor.

The prosecution urges that there were two different crimes, separate and distinct, charged in the two counts. We agree that under the statute Congress intended to create two crimes and two different criminals. But we insist that where a person consigns books to a carrier and does nothing whatever at the point of destination, he cannot be held guilty as consignee. Nor can he be punished twice for the same act without violating the Fifth Amendment. Yet that is precisely what happened to the defendant here.

In an attempt to extricate itself from the dilemma in which it faces, the prosecution has devised a novel contention (G. B. 30). It says that since the defendant was a distributor of *CALL HOUSE MADAM*, and since the copies of the book had to be conveyed from the printer to the carrier and from the carrier to the bookstore, the defendant was guilty of both depositing and receiving by virtue of the single act of causing to deposit. Presumably this means that a publisher of an indecent book who ordinarily fills his own orders direct without a distributor, is guilty

of only one crime (that of depositing), and that a bookseller who takes the book from a carrier is guilty of only one crime (that of taking). But a distributor who is not responsible either for printing or ultimate distribution to the reading public is, according to the prosecution, twice as guilty. The absurdity of the contention becomes all the more apparent when we realize that most books are sold not through distributors but directly by publishers to booksellers. If Congress had wanted to punish persons trafficking in obscenity twice on the same transaction, the distributor would clearly have been the least effective target.

The cases cited by the prosecution are not in point. Each of them involved two separate crimes requiring different evidence. Possessing liquor and selling it require different proof (*Albrecht v. United States*, 273 U. S. 1 (G. B. 28)), as do forging an endorsement and subsequently uttering it (*Wiley v. United States*, 144 F. (2d) 707 (C. C. A. 9) and *Demaurez v. Squier*, 121 F. (2d) 960 (C. C. A. 9), cert. den'd 314 U. S. 661 (G. B. 29)); breaking into a post office and stealing stamps from it (*Morgan v. Devine*, 237 U. S. 632 (G. B. 29)); agreeing to take a bribe and subsequently receiving part of it (*Burton v. United States*, 202 U. S. 344 (G. B. 29)); counterfeiting gas ration coupons and having the counterfeit coupons in one's possession (*Carney v. United States*, C. C. A. No. 11,001 (C. C. A. 9) (G. B. 29)); and making a counterfeit plate for \$10 Federal Reserve notes and having the plate in one's possession (*Michener v. United States*, U. S., 91 L. Ed. 1213 (G. B. 29)).

We repeat, "depositing" a book with a carrier is a quite separate crime from "taking" it from the carrier at the

end of the shipment. Indeed the United States Supreme Court in *United States v. Johnson*, 323 U. S. 273, stated that as to the mails the crime of the sender is complete when he deposits the letter in the mail. As we pointed out in our opening brief (A. B. Point V), the implication is clear that Congress intended to punish two different persons for two different offenses.

The prosecution's brief does not cite a single case where the same person was convicted of both crimes by virtue of the single act of depositing. Indeed, two of the cited cases would, if the prosecution's position had any substance, have resulted in conviction on two crimes instead of only one. In *United States v. Kenofsky*, 243 U. S. 440 (G. B. 31), it was held that a person could be convicted of "causing" a fraud letter to be deposited in the mails if he knew and expected it to be so deposited by an innocent party. The defendant was *not* convicted of "causing" the letter to be taken from the mails at its destination. The reason is not hard to find. The prosecution knew that, as a matter of law, it could not be done. In *United States v. Guest*, 74 F. (2d) 930 (C. C. A. 2) (G. B. 29) the Court held that a defendant who had caused a letter, deposited in Pennsylvania, "to be sent and delivered by the post office" to himself in New York with intent to defraud, was guilty of a crime in New York; yet the defendant was *not* accused of both "causing to be deposited" and "taking" from the mail, as he would have had to be under the prosecution's theory in the case at bar. So the *obiter dicta* of the *Guest* case, *supra*, cited (G. B. 30) to the effect that there may be three crimes committed by the *one* act, must be qualified by the corollary implicit in the case that only one conviction may be had and only *one* punishment imposed on any *one* crime

In our main brief we have conceded (A. B. 42) that under certain circumstances, separate offenses might be charged and proved under this statute. But that does not solve the question here. The defendant did nothing to "cause" the book "to be taken" in San Diego. The question is what was actually done rather than what might have been done. As Judge Faris, speaking for the Court in *Cain v. United States*, 19 F. (2d) 472 (C. C. A. 8) stated at page 474:

"The trouble is not with the law but with the facts. This possibility of a violation of either statute by wholly different acts is readily demonstrable. Many of the cases seem to make the latter possibility the test which saves the situation from double jeopardy. We think, however, it is a question of what was actually done rather than a question of what might have been done. Defendant concededly might have made a sale of morphine without sending such morphine through the mail, or he might have sent morphine through the mail, or shipped it by express or by freight, and thus have been guilty on the second count, without making a sale."

In the instant case the prosecution *might* have proved that the defendant, in person or through an agent, or by any other separate and independent act subsequent to the deposit, actually did cause the books to be taken from the carrier in San Diego. If this had been done, two separate offenses might have been proved. But what actually *was* done was to try to prove two alleged crimes by the same evidence.

"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test

which is a practical, not a theoretical, one. It is the evidence, and not the theory, of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution.” (*Murphy v. United States*, 285 Fed. 801, 817 (C. C. A. 7), cert. den. 261 U. S. 617.)

If it were held that the identical evidence could be used, the Fifth Amendment would be violated. If it were held that additional evidence was required of “causing to be taken,” Count Two would have to be dismissed for complete failure of proof.

POINT IV.

The Evidence Does Not Support the Conviction Under Count Two.

The prosecution argues (G. B. 32) that “it does not matter that the same proof is offered to sustain two separate crimes,” and that “the true test is whether the two crimes require different proof.” Even the prosecution realizes that this is double-talk, it concedes that the argument “may seem paradoxical.” Just because the defendant “hoped and expected” that the shipment would be taken from the carrier at destination, says the prosecution, he “caused” it to be so taken.

It is easy enough to surmise why the prosecution advances its paradoxical argument. It has to do so in order to lend a semblance of support to the conviction under Count Two. The thesis is a novel one. It says, in essence, that evidence on one crime may be borrowed to support conviction on a totally different crime. That the

prosecution has seen fit to resort to this thesis is an inferential admission that there is no evidence here on Count Two. Of this there can be no doubt. There is not a scintilla of proof that the defendant took the books or caused them to be taken from the carrier at destination.

United States v. Kenofsky, supra, cited by the prosecution (G. B. 32) is not in point. There the Court held that the defendant need not deposit a letter himself but might be guilty of causing the deposit if he gives the letter to someone who he knows will deposit it. This is emphatically not a holding that delivery by a carrier, which normally follows a deposit, is the equivalent of a taking from the carrier without any additional act on the part of the defendant after the carriage ends.

POINT V.

The Court Below Imposed Separate Sentences on Each Count. If Count Two Is Not Sustained, the Sentence Based on It Must be Reversed.

There is no ambiguity here as to the sentences that were imposed by the Trial Court. There were two *separate* sentences on the two counts [R. 17-18, 19, 20, 22-23, 51].

The prosecution asserts that since the Court could have given the defendant a fine and a suspended jail sentence on either count, the fact that Count Two may be bad is immaterial; and that the two sentences must in any event stand.

We submit the prosecution is in error. A consideration of the types of sentence which may be imposed by a Trial Court will make this clear. There are three types.

The first is a general or blanket or consolidated sentence which is not broken down into separate punishment for each count on which the defendant is found guilty. Two of the cases cited by the prosecution (G. B. 33) are of this type: *Abrams v. United States*, 250 U. S. 616 and *Whitfield v. Ohio*, 297 U. S. 431. Since a general sentence cannot exceed the maximum punishment which may be meted out on one count, a trial court imposing it in effect ignores the number of counts on which the defendant has been convicted. This type of sentence “conforms precisely to the facts; and on writ of error the presumption necessary to sustain it—namely that there was only one offense—is the exact truth.” (*Bishop, New Criminal Procedure*, 2d Ed., Sec. 1329.)

The second type of sentence is a separate sentence on each count where the sentences are to run concurrently. *Hirabayashi v. United States*, 320 U. S. 81 (G. B. 33) involved sentences that ran concurrently on each of two counts; it was therefore unnecessary for the Court to reverse the judgment even if one count was bad, since precisely the same sentence would remain.

The third type of sentence presents a wholly different situation. It occurs where a separate sentence is imposed on each count and the sentences either run *consecutively* or are *different* on different counts. Here the trial court is obviously influenced by the several offenses embodied in the various counts, and metes out punishment according to the *number* of crimes.

It is the *third* type of sentence which is now appealed. The Trial Court felt that two distinct crimes had been committed. He therefore imposed a separate sentence on each. To argue that the Judge might have imposed the

same penalties on the defendant even if he had been convicted of only one crime, is to indulge in speculation and to deprive the defendant of due process.

United States v. Weiss, 150 F. (2d) 17 (C. C. A. 2), cert. den. 326 U. S. 736 (G. B. 33-34) is not in point, as it involved a “technical” mistake.

Our contention is supported by this Court’s decision in *Barnes v. United States*, 142 F. (2d) 648 (C. C. A. 9). There the defendants were found guilty on four counts. The maximum penalty for each count was a fine of \$10,000, three years imprisonment, or both. The Trial Court imposed a fine of \$50 on each count. This Court reversed the conviction on Count Two on the ground that since Counts One and Two charged one offense, it was error to impose separate sentences.

This Court had previously ruled substantially the same way in *Dimenza v. Johnston*, 130 F. (2d) 465, rehearing den. 131 F. (2d) 47 (C. C. A. 9). The defendant in that case was convicted on five counts: one for robbery of a bank by force, three for the robbery but by means of a dangerous weapon which put three different persons in jeopardy of their lives, and a fifth for conspiracy to commit the crime. He was sentenced to consecutive jail terms of five years each on the first four counts, and two years on the fifth count—a total of 22 years. On a writ of *habeas corpus* this Court agreed with the defendant’s contention that only one offense, that charged in the second count, had been committed, and that only the con-

viction on that count could be sustained. The applicable statute allowed a 25-year sentence on the crime charged in that count. On the theory now advanced by the prosecution the aggregate of 22 years should have been upheld, since the defendant was guilty on a count on which 25 years could have been given. This Court emphatically rejected this theory, and since the defendant had served more than 5 years, ordered him discharged.

Assume that John Doe is convicted on ten counts of a crime. The maximum punishment for each count is ten years. He is sentenced to one year on each count, the sentences to run consecutively. Nine counts are reversed on appeal. Does the aggregate sentence of ten years still stand? The prosecution insists (G. B. 33) that it does. Both logic and the law dictate a contrary conclusion.⁸ For if the prosecution were correct, the vast majority of criminal appeals on multiple convictions would be a mockery.

⁸This is implicit in the decision in *United States v. Busch*, *supra*, cited by the prosecution (G. B. 27). There the Trial Judge though urged by the prosecution not to do so, insisted on imposing consecutive sentences on each of three counts even though he could have given the aggregate upon either one of the first two counts. On appeal the defendant claimed, as defendant Rodd does, that the first two counts did not charge separate crimes. On the theory advanced in the case *sub judice* (G. B. 33) the Court should have said that it was irrelevant since the total punishment could have been imposed on the remaining good count. But the Court did not do this; it very carefully examined each of the crimes and found them to be separate in fact and therefore affirmed the judgment of conviction. The inescapable inference is that if they were not separate crimes the sentence on the bad counts would have to be reversed.

It is unnecessary to multiply hypotheses. If the Judge below had wished, he could have imposed a "general" sentence on both counts. He did not do so. It cannot be assumed that this was unintentional⁹ If Count Two falls, the separate sentence given on it must fall with it.

Conclusion.

In our main brief (pp. 13-14) we said that under recent Supreme Court cases the basic question in an obscenity case is whether there actually exists grave and immediate peril that grownups of average sex instincts and intelligence will, on reading the material under attack, be driven to commit anti-social sexual acts. We further said that the record here was bare of any proof justifying a conviction under the clear-and-present-danger rule. The prosecution in its brief has failed to meet this point. CALL HOUSE MADAM is not obscene as a matter of law. The conviction on both counts should therefore be reversed.

In any event judgment must be reversed since Count One of the indictment is fatally defective, and since on Count Two there was either a total failure of proof, or an unconstitutional punishment twice for the same act. To repeat, we have not been able to find a single case

⁹If anything, it must assumed to have been intentional. The Trial Judge commented on the spotless record of the defendant and his company, and the fact that a great percentage of the books he had published were on "a high moral plane" [R. 48]. The Judge may well have borne in mind the possibility of appeal, and the legal consequence of a reversal on one count. There is no reason to suppose that he desired to deprive the defendant of the benefits of such a reversal.

where the defendant, having performed a single isolated act, was punished for two. The prosecution's brief fails to bring forward any such case. If the conviction on both counts is held valid, the sentence on Count Two should be set aside since the same facts were offered to prove both counts.

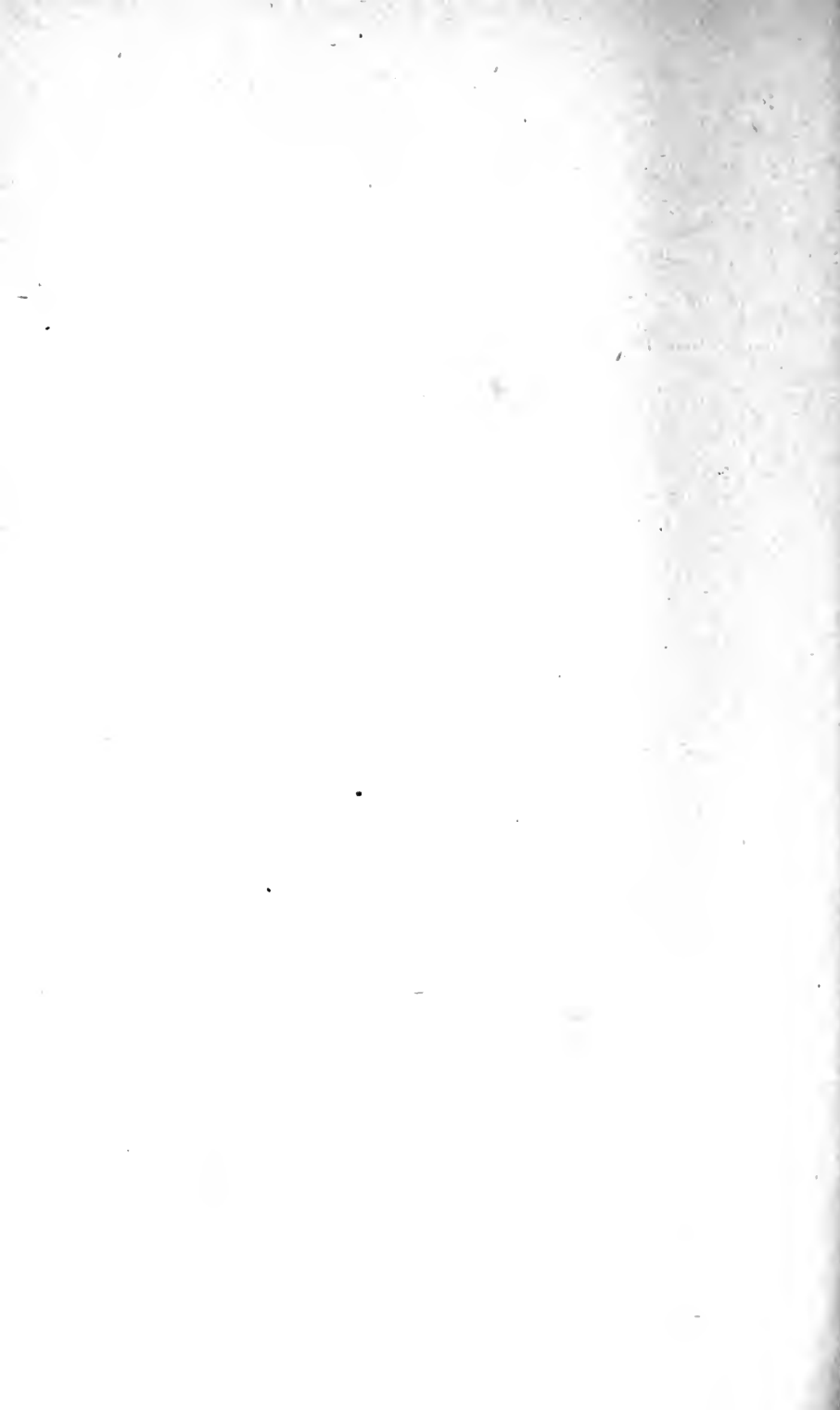
Finally, judgment should be reversed because no felonious intent on the part of the defendant was proved, and he did not receive a fair trial.

Respectfully submitted,

GREENBAUM, WOLFF & ERNST, and
ALEXANDER LINDEY, and
MERVIN ROSENMAN,

A. L. WIRIN, and
FRED OKRAND,

Attorneys for Appellant.



No. 11,429

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK KESSLER and IRVING J. LEVINE,
doing business under an assumed name, busi-
ness and style, as K & L DISTRIBUTORS,

Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

No. 11,429

Petition for Rehearing

EMORY & HOWE,
Attorneys for Appellant
977 Dexter Horton Bldg.
Seattle 4, Washington

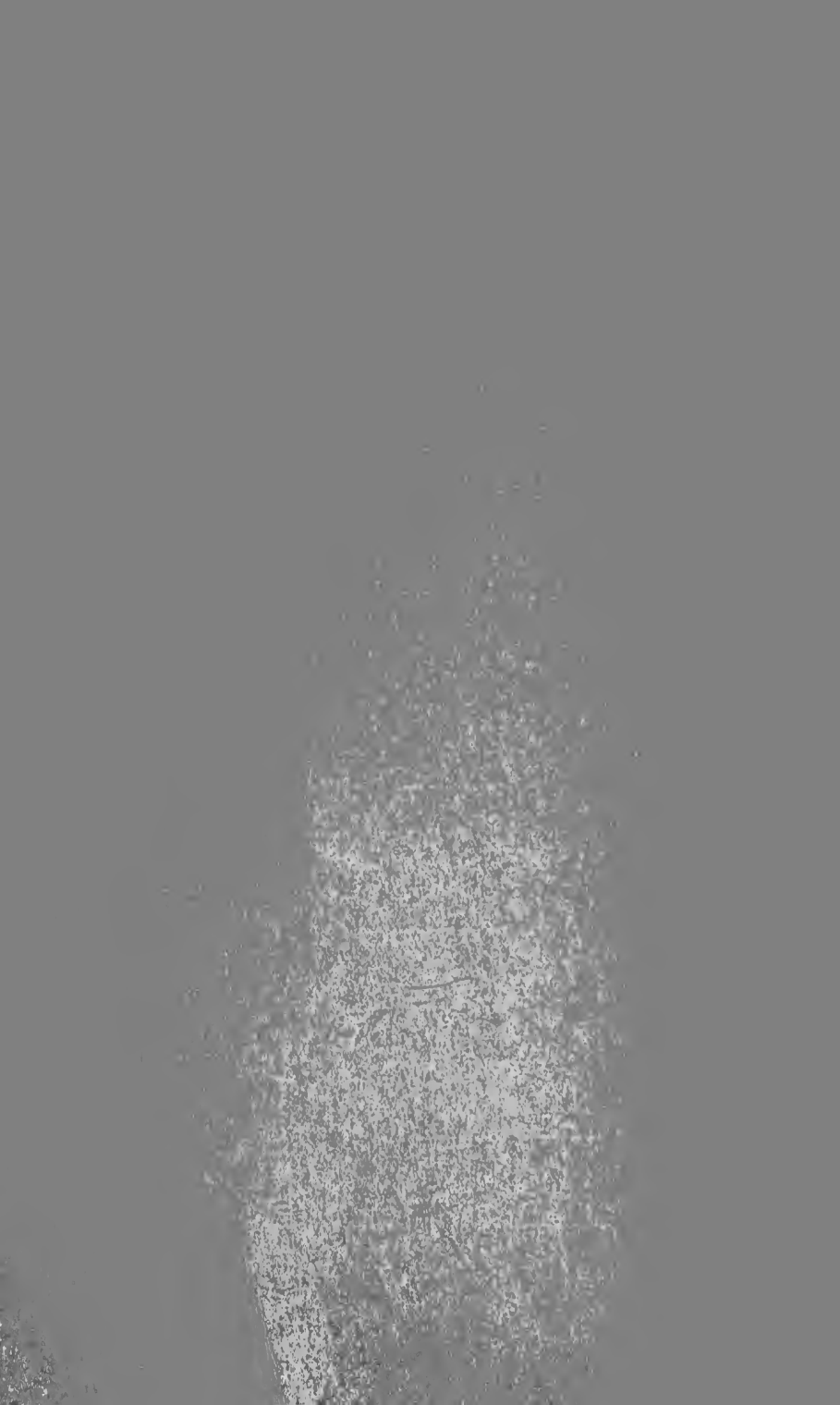
DeWOLFE EMORY
Of Counsel

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CLERK



No. 11,429

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK KESSLER and IRVING J. LEVINE,
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Appellee.

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Petition for Rehearing

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Attorneys for Appellant
977 Dexter Horton Bldg.
Seattle 4, Washington

DeWOLFE EMORY
Of Counsel

Come now the Appellants above named and respectfully
petition this Honorable Court for a rehearing of the appeal
in the above-entitled cause, and in support of this petition
represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but shall in this petition address ourselves solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles. Without further comment, therefore, we specifically reserve the points of:

- (1) claimed authority of district enforcement attorney to institute the litigation;
- (2) whether the sales in question are not in fact and in law, export sales;
- (3) whether the Administrator is estopped, or the cause should be withdrawn, because of the conduct of Administration personnel in dealing with the Appellants.

These points are determined adversely to the Appellants in the portions of the printed opinion designated as sections 1 to 3 respectively.

The foregoing features being reserved, and not commented upon herein, this petition is devoted to convincing this Court that it has erred in its determination of the fourth major question put to it upon appeal. At pages four and five of the printed opinion, the court concludes that the one-year limitation upon this cause of action was satisfied because, "The question as to when the parties intended title to pass presented an issue of fact to be resolved by the trial court on consideration of all the evidence bearing on the subject."

This statement, upon which the result depends, is demonstrably erroneous. It is especially so when further quotation discloses that the evidence considered is that pertaining to the times of physical transfer of possession of the bills of lading.

As is noted in the paragraph of the printed opinion which commences at the bottom of page four thereof, there are two sections of the Uniform Sales Act which were urged upon the Court as applicable. Appellee claimed that section 18 is the pertinent section. That section reads as follows:

“(1) Where there is a contract to sell *specific or ascertained* goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.” (emphasis supplied)

On the other hand, Appellants claim that the applicable section in this case is section 19, Rule 4:

“(1) Where there is a contract to sell *unascertained* or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer . . .” (emphasis supplied)

This Court has mistakenly accepted section 18 as controlling; has quoted from it to the effect that intention con-

trols and that certain factors evidence intention; and has applied it to this case in affirming the trial court's holding that none of the alleged violations is barred by the one-year limitation.

The contrary meanings of "unascertained" goods and of "specific or ascertained" goods, pose a problem of definition in this case which can only result in the determination that these goods were "unascertained" and that the principles of law urged by the Appellants are the ones to be applied.

There is no question from the record but that the Tom Burns whiskey sold to Shyman was a part of a larger stock. It was sold under its brand name and in certain sizes of containers as a description. Prior to the shipment of the merchandise, could Shyman have gone to the warehouse of the rectifier and said, "This lot of whiskey is mine; that lot is not"? He could not have done so because his contract was not for specific, ascertained goods. Until segregated and shipped, the whiskey being sold him was not identifiable, was not specific, and section 18 of the Sales Act does not apply.

Of the word "ascertain," the *New Century Dictionary* (Appleton-Century, 1927), page 76, says:

"To make certain, clear, or definitely known . . ."

The pertinent definitions by the *Webster Twentieth Century Dictionary* (Publishers' Guild, 1941), at page 104, are:

“To make certain; to define or reduce to precision, by removing obscurity or ambiguity; to determine; . . . To fix, to establish with certainty; to render invariable and not subject to will.”

Ballentine's Law Dictionary (Lawyers' Co-op., 1930), at page 110, says:

“To make certain; to fix; to establish with certainty . . .” That this is the meaning to be applied to the term “ascertained goods” as applied to the field of sales law, is made clear by the phraseology employed by Professor Vold in his work, *Vold on Sales* (sec. 73-75, p. 192), of “*certain, particular, identified goods.*”

Publicker Commercial Alcohol Co. v. Harger, (Conn. 1943) 129 Conn. 655, 31 Atl. 2d 27, illustrates the application of the terms in a case involving whether certain alcohol being sold constituted ascertained or unascertained goods. At page 28 of the Atlantic Reporter publication, the court says:

“The situation does not fall within rule 4 . . . (of section 19) . . . of our Sales Act, for the reason that that rule applies only as regards a contract to sell unascertained or future goods by description, whereas the sale here in question was of goods definitely identified by the serial numbers of the drums.”

Certainly these goods were unascertained goods being sold by description, and it is certain to us that the rules of law set out at pages 45 to 49 of the opening brief of Appellants are the ones which must control in determining when

the alleged violations of sale and delivery took place. In an appropriate disposition of the limitation contention made in this case, the first essential is the determination of the dates of alleged violation.

This Court has erred in determining the date of alleged violations upon this mistaken basis:

- (1) Section 18 of the Uniform Sales Act determines the transfer of title to goods upon the intention of the parties.
- (2) The intention of the parties is evidenced by the physical transfer of possession of the bills of lading to Shyman.
- (3) The earliest delivery of a bill of lading to Shyman was April 29, 1943, and therefore the institution of this action was within a year of all such alleged violations.

But that disposition of the case perpetuates the error of the trial court in ignoring that these goods were *unascertained*. Section 18 of the Uniform Sales Act is inapplicable and has no proper place in the disposition of this cause except to be rejected. Appropriate determination of the question of applicability of the one-year limitation, must start with a correct basis of recognizing the nature of the goods. We repeat and emphasize that these goods were *unascertained*; they were *not specific*; they were *not identified*.

Instead of turning to Section 18, we must therefore turn to Rule 4 of Section 19 of the Uniform Sales Act to find when

the title to these goods passed to the buyer. We discover that it does so when the goods are appropriated to the contract, and that (sub-par. (2)) appropriation occurs upon delivery to the carrier. The court will find no reference to physical transfer of possession of the bill of lading; delivery of the bill of lading has no bearing upon the passage of title; the Court errs in saying: "title did not pass from K & L to Shyman until the bills of lading were endorsed and delivered to Shyman in Seattle." The law is otherwise; the law is that title passed when the goods were delivered to the carrier. We respectfully and confidently refer the court to the authorities cited at pages 46 to 48 of the opening brief of the Appellants herein. Those authorities clearly spell out the following points of law:

- (1) in an "f.o.b. point of shipment" sale, title passes upon delivery of the goods to the carrier.
- (2) delivery to the carrier is delivery to the buyer.
- (3) these rules apply when the bill of lading is to the seller's order, blank endorsed.

The opinion of this Court has not cited, distinguished or rejected those authorities. Instead the court merely says: "The question as to when the parties intended title to pass presented an issue of fact to be resolved by the trial court. . . . We are not able to say that the finding is clearly erroneous." This result, grounded upon the acceptance of Section 18 of the Uniform Sales Act, is clearly erroneous because that sec-

tion does not apply. This was no question of fact to be determined by when bills of lading were physically handed over; the Uniform Sales Act tells us that title to these goods passed when they were delivered to the carrier, and uncontradicted case authority tells us that such delivery is delivery to the buyer.

Such passage of title and such delivery are what constitute the alleged violations in this case, and this Court erred in failing to apply the one-year limitation against the dates of "sale" and "delivery" which occurred upon the delivery of the merchandise to the carrier. Assuming (for the purposes of this petition) that the Court's opinion was correct in all respects save this one, the judgment should have been affirmed only in the amount of \$29,090, rather than \$42,861 (K & L Exhibit 26, R. 133). The Court clearly erred in failing to apply the principles here urged.

For the foregoing reasons, this petition for rehearing should be granted.

EMORY & HOWE

Attorneys for Appellants.

DeWOLFE EMORY

Of Counsel

CERTIFICATE OF COUNSEL PURSUANT TO
COURT RULE 24

STATE OF WASHINGTON
COUNTY OF KING

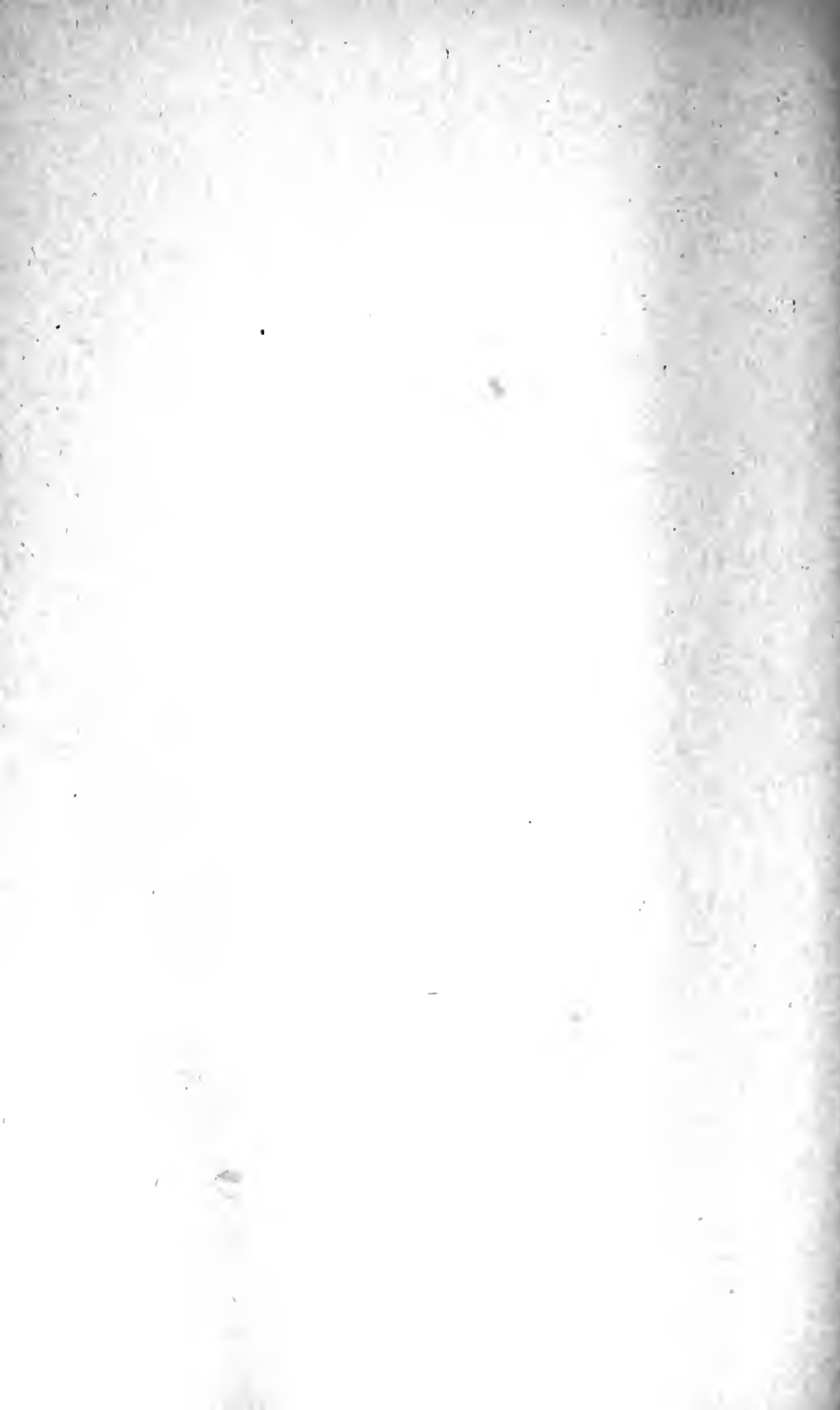
SS.

DE WOLFE EMORY, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for Appellants in this cause; that he is an attorney admitted to practice before the District Court of the United States for the Western District of Washington, Northern Division, and before this Court; that he makes this certificate in compliance with Rule 24 of the rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded; and that the same is not interposed for delay.

Subscribed and sworn to before me at Seattle, Washington, this 8th day of September, 1947.

*Notary Public in and for the State of
Washington, residing at Seattle.*



No. 11438

In the
United States
Circuit Court of Appeals
In and for the Ninth Circuit

DAVID KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division.

DAVID C. MARCUS,
129 West Second St.,
Los Angeles, Calif.,
Attorney for Appellant.

FILED

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In the
United States
Circuit Court of Appeals

In and for the Ninth Circuit

DAVID KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 11438

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

HISTORY OF THE CASE

On May 28, 1946, the United States attorney at Los Angeles, California, filed Information No. 18539 charging defendants Pioneer Provision Co., Inc., and David Kramer in 21 counts with violation of the Emergency Price Control Act of 1942. 50 U. S. C. App. 901 et seq.

The charging language of each and every count is in identical language, viz.:

“ . . . in the Southern District of California, the defendants, Pioneer Provision Co., Inc., a corporation did, and caused others to offer, solicit, attempt and agree to sell, and did sell and caused others to sell to . . . certain meat items, *as shown on Invoice No. of the Pioneer Provision Co., Inc.*, for a price per pound which was as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239 thereunder.” (Transcript of Record, pages 2-13 inclusive.)

The wording of all counts with the exception of the date, Invoice No. and the person to whom the meat items were sold are identical.

On July 5, 1946, the defendants through their attorney of record David C. Marcus filed their “Demand for Bill of Particulars” respecting each count of the indictment demanding that defendants be advised and furnished with

“(1) The contents of each and every invoice as numbered in each and every count.

“(2) The amount in excess if any ‘for which the said meat sold per pound which was . . . in excess of the maximum price for said meat items permitted under the Emergency Price Control Act of 1942 . . . ’

“(3) What other persons the defendants caused to sell such meat items . . .

“(4) The permitted price of said meat under the said Emergency Price Control Act and the amount sold in excess under said Emergency Price Control Act . . .

“These defendants . . . are unable to properly present their motion to dismiss *attach said information and prepare and present their defense unless they are informed of the entire contents of the purchase orders described and designated as before.*” (Italics ours.) (Transcript of Record, pages 13-14 inclusive.)

On July 8, 1946, the Demand for Bill of Particulars came on for hearing before the Honorable Campbell E. Beaumont. The following appears of record:

“Los Angeles, California
Monday, July 8, 1946. 2 p. m.

THE CLERK: United States vs. Pioneer Provision Company and David Kramer.

MR. RITZI: If the court please, the government feels that many of the requests for the bill of particulars are sound. I think counsel and I can enter into certain stipulations that will save the court a lot of time in hearing this matter. I think portions of the bill are good.

THE COURT: Anything you and Mr. Marcus agree upon will be satisfactory to the court.

MR. RITZI: If the court please, the government is willing to furnish Mr. Marcus with the contents of the invoices, the amount in excess of the

ceiling price, and the ceiling price of the meat itself. However, as to point No. 3, what other persons the defendants caused to sell such meat items as contained in each, every and all counts in said information, the government is not willing to stipulate to that.

MR. MARCUS: I will waive that, your Honor.

THE COURT: What about No. 4?

MR. RITZI: Yes, that is the ceiling price; we will furnish him with the ceiling price.

THE COURT: *Then you will furnish him with all of the information requested in subdivision 1, 2 and 4?*

MR. RITZI: *That is correct.* [8]

MR. MARCUS: Your Honor, we were discussing the matter of procedure here. *As I understand, a copy will be furnished me of the original filed with the court, because the way the information is drawn, if the quotation on the statement is not in excess that would call for a dismissal of the action.* (Italics ours.)

THE COURT: *That is the usual procedure.*

MR. RITZI: *That is true. I will not do it, myself.* (Italics ours.) This matter was given to me about fifteen minutes ago. It was handled by another assistant in the office, and will be assigned to another one. I just came down for this matter.

THE COURT: *The way to proceed will be as outlined by Mr. Marcus.* (Italics ours.)

MR. RITZI: That is correct. We will file those particulars with the court and furnish Mr. Marcus with a copy.

THE COURT: Court is now recessed. [9]"
(Transcript of Record, pages 40-41.)

On July 19th before the same court, Mr. Arthur Livingston representing the government the following appears of record:

"For the Defendant: David C. Marcus, Esq.,
213 South Spring Street, Los Angeles, California.
[10]

Los Angeles, California

Friday, July 19, 1946. 4:00 p. m.

MR. LIVINGSTON: This is the matter that I might state I was before your Honor on yesterday. It is cause No. 18539, United States vs. Pioneer Provision Company. Mr. Marcus represents the defendant corporation as well as the individual defendant, David Kramer. *In this case your Honor ordered the government to file a bill of particulars by July 22, 1946, which is next Monday.* The case was at that time, at about that time, being handled by Mr. Horgan, who is no longer with the office, and it was just assigned to me yesterday. *Because it will be necessary to have certain photo-stats made and because it will be necessary to have certain transcripts of Grand Jury testimony prepared, which I am now informed could not be prepared until the very last part of next week, I move the court to continue the time to file the bill of particulars for two weeks from July 22nd.*

MR. MARCUS: No objection, your Honor.

THE COURT: It is so ordered.

MR. LIVINGSTON: The court, then, upon the basis of the bill of particulars being filed July

22nd, set the time for arraignment and plea as of July 29th. Will your Honor then continue that for two weeks, so that *the defendant does not have to appear on the 29th?*

MR. MARCUS: No objection. [11]

THE COURT: Is this an information?

MR. LIVINGSTON: Yes. No bond has been set.

THE COURT: It is so ordered. [12]"
(Transcript of Record, pages 42-43.)

NO BILL OF PARTICULARS GRANTED BY THE COURT WERE EVER FURNISHED BY THE GOVERNMENT, NOR SUPPLIED TO THE DEFENDANT.

On July 26, 1946, the defendant, David Kramer, appeared before the Court and the following appears of record:

"THE CLERK: United States vs. Pioneer Provision Company, Inc., and David Kramer.

MR. TOLIN: The defendant, David Kramer, is in court. I am advised that the defendant, David Kramer, desires at this time to withdraw—or, he has not pleaded, but he desires to enter a plea of nolo contendere to counts 2, 4, 6, 13, 17, and 21. The government does not oppose the plea of nolo contendere." (Transcript of Record, page 43.)

"THE COURT: Mr. Marcus, will you indicate to the court what the circumstances are that make you believe that the court should consent to the plea of nolo contendere?

MR. MARCUS: Your Honor, I have examined to some extent each individual count in this case. Your Honor has asked me to indicate to the court the reasons. The details of each count, as I understand it, might be a bookkeeping error. If your Honor will—the motion for the bill of particulars was based upon the fact that it is alleged that certain meat items, and I am quoting from each count in this information, as shown on invoice No. 2700 of Pioneer Provision Company, were sold for a price per pound which was as the said defendants then and there well knew in excess of the maximum price for the said meat items permitted under the Emergency Price Control Act.

As I understand, the invoices themselves might be in error. That is the extent of my information.

THE COURT: Mr. Tolin, what have you to say about it? What about the matter of the actual intent on the part of the defendant?

MR. TOLIN: *This is a case, if the court please, in which we have had some discussion in chambers with the court. I think the defendant had the requisite intent to violate the act; however, the defendant has come in with a very frank and [15] fair attitude toward the government in the matter, and we believe that he was led by others sufficiently that we do not oppose the nolo plea.*

THE COURT: Under the circumstances and the apparent belief of the United States Government that it is a proper case for nolo contendere, the court will consent to it." (Italics ours.) (Transcript of Record, pages 44-45.)

“THE CLERK: As to counts 2, 4, 6, 13, 17, and 21 of the information, do you plead nolo contendere?

THE DEFENDANT: I do, nolo contendere.

THE CLERK: As to counts 1, 3, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19 and 20 what is your plea?

THE DEFENDANT: Not guilty.

THE COURT: The court will fix the time for pronouncing judgment and for hearing the report of the probation officer on the 12th day of August at 3:00 o'clock in the afternoon and will fix that date as the time for setting the case for trial upon the other counts.” (Transcript of Record, page 46.)

On August 12, 1946, defendant appeared and the following occurred of record:

“MR. LIVINGSTON: If the court please, might this matter be continued for the purpose of sentence until September 16th?

THE COURT: What is the purpose or reason for the continuance?

MR. LIVINGSTON: This matter, if the court please, in the first place, I do not have the probation report. However, as I understand it from the probation office—

THE COURT: It has been filed. I have it.

MR. LIVINGSTON: This is a matter in which this defendant has co-operated with the government, and it is suggested that the time for sentence be continued. It is a matter which I have discussed with your Honor, and I understand a continuance is satisfactory to Mr. Marcus.

THE COURT: *Yes. You mentioned it to the court just briefly during the recess, but whatever the reason is I would like to have you make a statement now, Mr. Livingston.* [21]

MR. LIVINGSTON: Yes.

This defendant is co-operating with the government in connection with some other matters, and for the purpose—

THE COURT: Other matters? You mean other indictments?

MR. LIVINGSTON: That is right, sir.” (Italics ours.) (Reporter’s Transcript, pages 48-49.)

“THE COURT: That is just a request on the part of the government to continue it. There has been no understanding here that the matter would be continued at all. But the court will continue it at the request of the government until the 16th of September at 3:00 o’clock. [22]” (Reporter’s Transcript, page 50.)

The cause was continued until September 16, 1946, and on said date continued again until September 17, 1946.

On this date (September 17, 1946) the defendant appeared for sentence. After considerable discussion the details of which we will discuss hereafter in this brief the defendant Kramer was sentenced to serve (1) one year on count 2, to pay a fine of \$3,000 on count 3, on counts 6, 13, 17 and 21 imposition of sentence was suspended for the period of one year after defendant “shall have been released from prison.” (Transcript of

Record, pages 62-63.) Thereupon and upon the posting of a \$5,000 appearance bond execution was stayed until "the 24th day of September at 3:00 o'clock in the afternoon." (Transcript of Record, page 67.)

On September 23, 1946, at 4:15 P. M., in open court the defendant filed "Motion to Withdraw Plea of Nolo Contendere" and his "Motion to Reconsider Sentence Under Rule 35." (Transcript of Record, page 68.) The contents of said motions may be found in the Transcript of Record, pages 24, 25, 26. At said time appellant's counsel indicated to the Court

"I am presenting the motion alone today in connection with this matter for the reason *that your Honor has stayed the execution until tomorrow . . . but we intend further, your Honor, in this matter to file a petition for a Writ of Coram Nobis.*

"There are many matters that I believe the Court should be acquainted with that have occurred outside of the record, and with which Your Honor is not acquainted in this case. . . . I did not at this time, Your Honor, wish to argue this motion to withdraw the plea because I believe I would be duplicating my efforts and my argument in connection *with the motion of Coram Nobis that I intend to file in this case.*" (Transcript of Record, pages 68-69.)

The Court was again requested by defense counsel permission to file his petition of *Coram Nobis* and the Court made the following observations:

"THE COURT: Are you ready for the court, then, to rule upon the motion to withdraw the plea?

MR. MARCUS: I would ask your Honor to grant us time so that this point could be briefed, *and permit us to file the petition for coram nobis and to argue it at the same time that we argue this motion to withdraw the plea.*

THE COURT: Now, Mr. Marcus, the court, it seems, has been very considerate of your motions in this matter. I do not expect to be here next week, and whatever is done by this court will have to be done this week.

MR. MARCUS: I could prepare the motion and prepare the affidavits before the end of the week, your Honor.

THE COURT: When did the court order that this stay of execution be effective to, what date?

MR. MARCUS: To tomorrow afternoon at 3:00 o'clock.

THE COURT: You be prepared to argue your motion by tomorrow afternoon at 3:00 o'clock and before that time if possible." (Transcript of Record, pages 69-70.)

After taking the statement of Mr. Tolin defendant's Counsel again requested the Court for permission to file his affidavit in support of his motion to vacate the plea. This the Court refused to do.

The following appears of record:

"THE COURT: Now, Mr. Marcus, you spoke something about an affidavit. Whose affidavit is it?

MR. MARCUS: Well, it will be Mr. Kramer's affidavit.

THE COURT: Have you prepared it now?

MR. MARCUS: I haven't prepared it.

THE COURT: Let him be sworn and I will take his statement now. I want this matter concluded with the exception of the question of law to be argued tomorrow. Just let him be sworn and make his statement *now*. *He won't have to make an affidavit.*" (Transcript of Record, pages 89-90.)

David Kramer was therefore called as a witness and testified. At the close of his testimony, Mr. Marcus, his counsel, made the following motion:

"The motion in addition may be considered as a motion to set aside the Nolo Contendere plea and to withdraw the plea of Nolo Contendere upon the additional ground . . . that there were inducements held out to this defendant. . . ." (Transcript of Record, page 122.)

We believe that the foregoing sufficiently establishes a basis for a consideration of the defendant's motion to set aside the plea of Nolo Contendere, and upon which we will proceed to argue the evidence permitted to be introduced in support of this motion and the legal effect of such proof.

However, the Court's action in this regard in forthwith compelling the defendant to take the stand and testify in lieu of filing his formal affidavit and motion because as the Court indicated "Mr. Marcus, the Court it seems has been very considerate of your

motions in this matter. I do not expect to be here next week, and whatever is done by this Court *will have to be done this week*," was prejudicial error alone warranting a reversal. The matter will be further discussed under a different heading.

I.

THE INFORMATION DOES NOT STATE A PUBLIC OFFENSE

Rule 7 (c) of the Rules of Criminal Procedure effective March 21, 1946, provides in part as follows:

“Rule 7—

“The Indictment and The Information

. . .

“(c) The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .”

See,

Lowenburg vs. United States, 156 Fed. Rep. 2nd 22.

Although the Bill of Particulars requested by defendant and ordered by the Court would have appraised the defendant of the specific offenses and over ceiling violations charged yet none were ever furnished, before the entry of the plea of *nolo contendere*. Although the government agreed the motion was well taken and

would be furnished. This Court will take judicial knowledge that there were hundreds of different ceiling prices for different *kinds, grades, cuts* of meats and meat products during the existence of meat ceiling prices not one being alleged in any count of the information. Reference is made in each count of the information to certain invoices, but the specific violation, the contents of the invoice, the over-ceiling price charged, the legal permissible ceiling price and the kind, grade, cut of meat or meat product are now where found or alleged.

This Court may take judicial knowledge that many "meat items" were never subject to price regulation during the war. Then how could defendant have knowledge of the specific offense of which he is charged if not one "meat item" was ever alleged.

The test as outlined under the revised rules whether the complaint states an offense may be found in *Lowenburg vs. United States, supra*:

"An indictment which merely charges a defendant with refusing to perform the duties assigned to him is wholly insufficient to apprise him of the specific offense with which he is charged or which he is expected to meet so as to enable him to prepare his defense thereto or *plead the judgment of guilty if any as a bar to a further prosecution.*"

This Kramer information charges that "David Kramer . . . did . . . sell to . . . certain

meat items as shown on Invoice No. for a price per pound. . . . in excess of the maximum price for said *meat items* permitted under the Emergency Price Control Act of 1942. . . . ” No one can state from this information what “meat items” were charged, or intended to be charged, how many appeared on said Invoice No. the kind, character, grade and cut of the “meat item.” All these things we suggest for how could Kramer “plead the judgment of guilty as bar to a further prosecution” from the meagre, slim and entirely hypothetical information contained in the charge *which information* would have to be gathered from a document outside the record contained in a certain “invoice” No. the contents of which was never disclosed.

The essential elements of an indictment or information were stated by the Supreme Court in *United States vs. Hess*, 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516, as follows:

“The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone.”

The allegations in each count of the information are not even alleged in the mere words of the statute.

The contents of—"Maximum Price Regulations Nos. 148, 169 and 239 . . . " are unknown (and we state to this Court parenthetically, we have, after very careful search and inquiry of all possible and available sources, been unable to find these regulations). Certainly this Court will not take judicial knowledge of "Maximum price regulations Nos. 148, 169 and 239 . . . "

Then without alleging the specific "meat items," the maximum price regulation and the actual charged price how could Kramer ever plead the conviction as a bar, upon a subsequent prosecution.

As was stated in *Frankfort Distilleries, Inc. vs. United States*, 10 Cir., 144 Fed. 2d 824, 830:

"Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense, unless the words themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished. Where the statute is general in terms and fails fully, directly, and expressly to set forth with certainty and without ambiguity all of the essential elements necessary to constitute offense, the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed."

See, also,

Mitchell v. United States, 10 Cir., 143 F. 2d 953, 955;

Kane vs. United States, 8 Cir., 120 F. 2d 990, 992;

Evans vs. United States, 153 U. S. 584, 587; 14 S. Ct. 934, 38 L. Ed. 830;

United States vs. Crummer, 10 Cir., 151 F. 2d 958, 962;

Harper vs. United States, 8 Cir., 143 F. 2d 795, 802;

Frankfort Distilleries, Inc., vs. United States, 10 Cir., 144 F. 2d 824, 830.

All the foregoing citations were quoted with approval in *Lowenburg vs. United States* wherein the Court through Circuit Judge Huxman stated:

“While the strict rules of pleading in criminal prosecutions have been relaxed, the fundamental functions and requirements of indictments have not been altered or modified. The purpose of an indictment still is to inform the accused of the offense with which he is charged, and this it must do with sufficient clarity to enable him to adequately prepare his defense and to plead the judgment of conviction, if any, as a bar to further prosecution.”

We respectfully submit that the information, judged by the light of tested requirements, fails to allege a public offense. The Trial Court was therefore without jurisdiction to impose its judgment and sentence in the case.

In order to chronologically detail the considerable evidentiary matter introduced in support of appellant's

motions to "Reconsider and Reduce Sentence" and to "Withdraw Plea of Nolo Contendere" (Transcript of Record. pages 23 to 26) it will be necessary to quote extensively from different portions of the record not necessarily consecutively for which we must beg this court's indulgence.

It is an elemental principle of law that the defendant and his counsel have an intelligent and full understanding of the charge against him. It is the first requirement of due process.

Ammons vs. King, 8 Cir., 133 F. 2d 270, 272;
Smith vs. O'Grady, 312 U. S. 329, 61 S. Ct. 572,
 85 L. Ed. 859.

As before recited in this brief, on July 8, 1946, it was agreed in open court the procedure to be followed. (See pages 3, 4.)

It was not until the hearing on the motion to withdraw the plea were the "invoices" mentioned in the information produced in Court by the Government and delivered to defendant's counsel. The following colloquy appeared between the Court and counsel.

"MR. MARCUS: Your Honor, I would desire at this time to introduce as part of this testimony the statements that are alleged in these various counts to which the plea was entered.

THE COURT: To do what?

MR. MARCUS: The statements that are contained in the various counts that are alleged that show a price violation; and I submit that the statements, if introduced, will show that there was no price violation." (Transcript, page 114.)

“MR. LIVINGSTON: I have no objection, if the court please. I have—I lack one, is what I mean to say, of the statements. However, Mr. Marcus is in error. They are not statements; *they are invoices of the Pioneer Provision Company. As such they are used in the allegations not to show a violation, but merely as a list of the meat items sold.* They show on their face certain prices. Now, neither Mr. Marcus nor I are so naive as to think that these prices in themselves show an over-ceiling violation.” (Transcript, page 115.)

“THE COURT: What position do you take in regard to that?

MR. LIVINGSTON: We take this position, that they have absolutely no materiality. In this interrogation if Mr. Marcus wishes them for whatever purposes he wishes them, we are giving them to him. But they certainly do not show the instance of this defendant. They are merely, as I have pointed out, the defendant’s invoice upon which the meat items are listed. That is all they are for.

THE COURT: What is your position with regard to the payment in excess of the maximum price?

MR. LIVINGSTON: That is a matter of proof at the time of trial. We certainly don’t claim that the prices on these invoices are over-ceiling prices.” (Transcript, pages 117-118.)

We now discover the real reason for not filing the Bill of Particulars, because the Government knew at all times that the invoices showed no over-ceiling violation. Defendant’s counsel was without knowledge of

their content, until after the entry of the plea, the imposition of sentence and until on the hearing of the motion to vacate the plea the invoices for the first time were delivered to counsel. The U. S. attorney well knew, in view of the stipulation, that if the invoices showed no over-ceiling the case was to be dismissed. Their failure to advise defendant's counsel of their contents, their continuous objections to their introduction in evidence at the hearing (Transcript, pages 114-118 incl.) constituted a legal fraud upon the defendant. This lack of information in the complaint against the defendant constituted a failure to fully advise the defendant of the charge so that he would have an intelligent understanding of the offense and constituted a denial of due process.

Bergen vs. United States, 145 Fed. 2d 181.

The entry of the plea of Nolo Contendere was a waiver of defendant's fundamental rights and in strict parlance a "no contest" to the government's charge against which every reasonable presumption is indulged in.

Bergen vs. United States supra;

Glasser vs. U. S., 315 U. S. 60, 62 S. Ct. 457,
86 L. Ed. 680.

The failure of the government to advise the defendant and the Court that the invoice did not show an over-ceiling charge until after the entry of the plea, sentence and judgment, and then only at the hearing on the motion under the circumstances as indicated in

this case amounted in legal effect to the absorption of defendant's legal right by, to say the least, legal fraud. It was the plain duty of the prosecution when these facts became a matter of public record, in view of their stipulation, at the onset of this case, to have immediately and without further compunction or technical objection dismissed the entire proceedings. If this did not cast a cloud of suspicion upon the administration of justice, then it is difficult to imagine a situation that does. It is far better that one defendant go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes should play fast and loose with their stipulations, their words and promises to persons charged with crime.

This was an unfair advantage the prosecuting officers should not be permitted to profit by. The professions of lack of knowledge by defense counsel of the contents of the invoices surely placed the U. S. attorney on notice that he and the defendant were relying on the fact that they did show an over-ceiling violation. The learned U. S. attorney admitted that the method of proving an over-ceiling violation was through "expert opinion." (Transcript, page 162 and 164.) If such be the proof necessary to establish the fact of an over-ceiling price then the layman cannot be blamed for the utter lack of knowledge of the over-ceiling price and the failure in this respect to allege such information in the complaint, deprived defendant of the right to be informed of the charge against him so that he could not again be charged with the same offense.

II.

THE INFORMATION AS STIPULATED BY COUNSEL AND ACQUIESCED IN BY THE COURT SHOULD HAVE BEEN DISMISSED WHEN THE "INVOICES" FAILED TO DISCLOSE AN OVER-CEILING CHARGE, OR VIOLATION.

At all times prior and subsequent to the inception of these proceedings the "invoices" were in possession of the United States attorney. (Transcript of Record, page 72.) These invoices had been delivered to the Government and were in their possession. After the plea of nolo was taken, the judgment entered and not until the argument on the motions were before the Court were the invoices produced by the United States attorney. It was then for the first time that the United States attorney admitted that the invoices *showed no over-ceiling charge or violation. The information should then have been dismissed or appropriate steps taken to abide by the solemn stipulation which would have corrected the wrong committed upon the defendant.* This the United States attorney refused to do.

We quote the record:

"I have been advised by my client that the government is today and has been ever since the inception of this case in possession of those statements, and those bills which show that there was no excess price charged for these various meat items." (Transcript of Record, page 74.)

During the course of argument upon the hearing of the motions the following colloquy appears:

“MR. MARCUS: I thought, your Honor, under that particular Section 35 that we would have a right to come in here and show this matter. *I don't know as yet to this date, your Honor, what those statements show*, only except what my client advises me. If there is a palpable injustice in this case, if those statements show that there was no violation of law, and no over-ceiling violations, I feel, your Honor, that we should be entitled to convey that information to the court.” (Transcript of Record, page 105.)

. . .

“MR. MARCUS: I mean this: If those statements upon which these counts are predicated show that there is no violation of law, whatever sentence the court would pronounce would be severe, *because the court* would have no right or jurisdiction to impose any such fine or imprisonment if the statements that the Government has in their possession show that there was no violation of law.” (Transcript of Record, page 106.)

Near the close of hearing the United States attorney made the following statement to the Court:

“MR. LIVINGSTON: We are not prepared to prove the case now. The proof of the ceiling price is a technical matter to be proved at the time of trial by experts. . . .

THE COURT: As I understood it the ceiling price was met by the invoice?

MR. LIVINGSTON: Correct.

THE COURT: That is the way I understood it yesterday.

MR. LIVINGSTON: Correct."

. . .

"THE COURT: Is it your understanding Mr. Livingston? Did the invoices represent the ceiling price?

MR. LIVINGSTON: That is my understanding.

THE COURT: Are you prepared so to show?

MR. LIVINGSTON: Not at this time, if the court please.—That is a matter of expert opinion.
 . . . "

III.

THE DISTRICT COURT ERRED IN COMPELLING DEFENDANT TO FORTHWITH PROCEED UPON HIS SUGGESTION THAT HE DESIRED TO FILE A FORMAL PETITION FOR WRIT OF CORAM NOBIS AND SUPPORTING AFFIDAVITS.

Judgment and commitment was imposed on *September 17, 1946*. Within the time required by the Revised Rules, viz.: on September 23, 1946, the defendant filed his written Motions—"To Reconsider and Reduce Sentence," and "To Withdraw Plea of Nolo Contendere." (Transcript of Record, pages 23, 24, 25, 26.)

The record shows that at 4:15 P. M. on said date, September 23, 1946 (Transcript of Record, page 67) the

foregoing motions were filed in open Court, and served upon the United States attorney in attendance. (Transcript, page 68.) The Court then stated:

“The Court will take them up now.”

Defendant’s counsel stated:

“I am presenting the motion alone today in connection with this matter for the reason that your Honor has stayed the execution until tomorrow. In addition to that, we made a motion to reconsider and reduce the sentence under Rule 35, on the various grounds set forth. *But we intend further, your Honor, in this matter to file a petition for a writ of coram nobis.*” (Transcript, page 68.)

“*There are many matters that I believe the court should be acquainted with that have occurred outside of the record, and with which your Honor is not acquainted in this case.*” (Transcript, pages 68-69.)

Counsel thereupon requested time to file his petition and motion and on three separate occasions at this session stated to the Court he desired time to file his petition and affidavits and to argue his foregoing motions so as not to duplicate his argument and take the Court’s time in handling the matter. (Transcript of Record, pages 68, 69, 70, 71, 77.)

The Record discloses that the Court stated:

“Proceed Mr. Marcus. You may first present your motion to withdraw the plea.” (Transcript, page 68.)

“MR. MARCUS: Well, your Honor, I thought it might be considered at the same time tomorrow.

THE COURT: *I would rather not. I don't have the time Mr. Marcus. You make your motion now. I was asked by Mr. Tolin to take this up now . . . notwithstanding the lateness of the hour I am ready to proceed with it and hear it.* (Transcript, page 71.)

and again,

I see no basis whatsoever for making the motion, not any. That is the court's present view of it, but I will not rule on it if you desire to present it further.

MR. MARCUS: *I do, your Honor, if the court please.*” (Transcript, page 70.)

Even the United States attorney suggested additional time to research the sufficiency of the information. (Transcript, page 71.) Defendant's counsel then stated to the Court all defendant's bills had been delivered to the Government prior to his entry into the case—

“which I have never as yet seen to this date”

and

“I am trying to get them, and I think the Government will deliver them to me.” (Transcript of Record, pages 72-73.)

and again

“I have been advised by my client that the government is today and has been ever since the in-

ception of this case, in possession of those statements and those bills, *which show that there was no excess price charged for these various meat items.* (Transcript of Record, page 74.)

Thereupon Mr. Tolin, assistant United States attorney, made a lengthy statement to the Court, pages 77 to 89 inclusive.

Thereupon the Court said:

“Mr. Marcus, you spoke *something* about an affidavit. Whose affidavit is it?

MR. MARCUS: Well it will be Mr. Kramer’s affidavit.

THE COURT: Have you prepared it now?

MR. MARCUS: I haven’t prepared it.

THE COURT: Let him be sworn and I will take it. . . . *He won’t* have to make an affidavit.” (Transcript of Record, pages 89-90.)

Defendant David Kramer was then sworn as a witness and testified at length, pages 89 to 119 of the transcript.)

Prior to adjournment to the following day and before the matter was submitted and during the formal hearing the Court made the following most significant observation:

“I am sure from not only the statements made by Mr. Tolin, *but from what I know of Mr. Tolin*, that he did not make any promise that this man would not be confined in prison; *that nobody else made any statement to Mr. Kramer who had a*

right to make it, or whom the defendant had a right to believe in.” (Transcript, page 122.)

The Court directed the United States attorney to secure witnesses to testify against Mr. Kramer’s statements that no over-ceiling charges were made (Transcript of Record, page 120) and adjourned Court at 6:00 P. M. until the following day at 1:00 P. M.

The proceedings amply demonstrate the state of mind of the learned presiding jurist. No rush of other business or the Court’s desire to immediately dispose of what he believed were motions with “no basis whatsoever” (Transcript of Record, page 70) was justification to be indulged in in order to deprive the defendant of his inherent right to a full and fair hearing and the right to present the necessary supporting documents, papers and affidavits, and not have his position prejudiced or influenced by the Court’s belief in and knowledge of the witness interested in the outcome of the case. Mr. Tolin was heard as a witness. His testimony was governed by the same rules of evidence as any other witness. Of what avail was it to the defendant to present his motion to vacate the judgment if the Court had determined *prior* to the calling of the witnesses to be sworn that the Court believed “That nobody else made any statement to Mr. Kramer who had a right to make it, or whom the defendant Kramer had a right to believe in.” (Transcript of Record, page 122.)

If that statement by the trial judge did not indicate a prejudging of the witnesses’ testimony who were later

called and testified *under oath*, including Mr. Tolin, then we are at a loss to find more convincing proof.

This was a serious matter. It involved the constitutional right of a defendant to a full, fair and complete hearing. It invokes the protective duty of the Trial Court to see that those whose very duty it was not to impose upon the defendant or to influence him in hope and faith of their protecting arm to change his plea which would subject him to years of imprisonment and thousands of dollars in fine.

If within the breast of the trial judge he had pre-determined the subject under inquiry which had deprived the defendant of his constitutional right to a jury trial and the testimony of the witnesses then we respectfully submit he should have disqualified himself and permitted other learned jurists to sit in judgment. For as one renowned poet said "No greater responsibility can come to man than to sit in judgment upon a fellow man."

Upon the mere filing of the formal motion to withdraw the plea and to reduce sentence, the Court, without further ado and immediately thereupon compelled the defendant to proceed and in addition thereto to present his evidence upon his motion for a petition for Writ of Coram Nobis which he indicated to the Court he desired to file. Sentence was imposed on September 17, 1946; the motions were filed September 23, 1946. Defendant still had four days to file his petition under the rules, nevertheless he was immediately

required to proceed with his argument and proof. This, in spite of the fact that the Court was advised defendant was not then in possession of his proof and that the invoices which he desired to use were in possession of the Government, the contents unknown to defendant's counsel, and which would show, if produced, no violation of law.

This conduct of the Trial Court, we respectfully submit, was a clear abuse of discretion and a violation of defendant's constitutional rights to the use of the Court's processes to present his cause by the approved and customary practices and forms.

IV.

THE DISTRICT COURT ERRED IN ITS RECEIPT OF EVIDENCE UPON THE MOTION TO VACATE THE PLEA.

At the direction of the Court, the Government produced two witnesses to whom it is claimed that David Kramer, defendant, sold certain meat items and made an over-ceiling charge. Defendant's counsel made an objection to the introduction of any testimony along these lines. The following appears of record:

“MR. MARCUS: Your Honor, I object to any questions along this line or any dealings as being incompetent, irrelevant and immaterial, and improper at this time.

THE COURT: Well, why is it, Mr. Marcus?

MR. MARCUS: Your Honor, because it raises the issue. If the question is as to this defendant's

guilt or innocence, at this time we should have the benefit of the doubt. He has entered a nolo plea. He is relying upon the fact that an injustice has been done him. We feel at this time that these proceedings—that it is improper to call any witnesses to testify against him.” (Transcript of Record, page 170.)

The only issue involved on the various motions was the defendant’s plea entered because of a misunderstanding of its effect, or because of misrepresentation, mistake or misapprehension. There was no issue of his guilt or innocence on these proceedings, for every defendant is vested with certain constitutional rights. If some fact occurred which overreached the free will and judgment of the defendant and he is deprived of a trial on the merits, then the only material, relevant and competent evidence at the hearing of his motion was not if he was guilty or could be proved guilty at the trial but whether or not his plea was entered on account of fraud, duress, misapprehension, mistake or other fact overreaching the free will or judgment of the defendant.

As was said in *Bergen vs. United States, supra*:

“The withdrawal should not be denied where a proper showing for its allowance is made, merely because the defendant might or probably would be found guilty . . . And in any case the motion should not be denied when it is evident that the ends of justice would best be served by granting it.”

And further in the opinion the Court states:

“Moreover the question here is not the probable guilt of the accused nor what caused him to change his mind but whether, at the time of the entry of his plea he had the requisite understanding of the charges against him.”

The weight and sufficiency of the witnesses' testimony who were brought at the Court's suggestion we shall not comment upon at this time; but suffice to say that not one competent expert witness testified to the O.P.A. ceiling price of the "meat items." The two witnesses whose testimony may be found on pages 169 to 195 of the transcript were interrogated along lines to show the guilt of the accused. This was not a proper subject of inquiry. If the Court permitted such evidence to be introduced, the defendant would then be entitled to bring the expert testimony to rebut this proof. This, then, would have entailed a trial on the merits.

Under this theory the defendant was entitled to the presumption of innocence. The only burden cast upon the defendant was to show that his plea was not fairly entered and not be required to prove his innocence on a motion such as this to vacate the judgment. (See *People vs. Schwarz*, 201 Cal. 309; *People v. Campos*, 3 Cal. 2d 15.)

This in face of the Court's ruling refusing to permit defendant to testify concerning his Commission of the charged offense.

“Q. Will you state to the court at this time whether or not you caused or solicited or attempted or agreed to sell, and did sell, or cause others to sell, under those various [93] counts meat above the ceiling price, and that that would be shown on your invoice statements as contained in the various counts?

THE COURT: The Court isn't going into that now.

This is a motion to set aside the plea of nolo contendere.

MR. MARCUS: Very well.” (Transcript of Record, page 112.)

V.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF NOLO CONTENDERE.

On September 23, 1946, as indicated before in this brief the defendant was required to proceed on his motion without any supporting affidavits. On suggestion of defense counsel, Mr. Tolin, the United States attorney, proceeded to make a statement to the Court. Mr. Kramer, not knowing there was any case in the office involving him, came to the office of United States attorney and requested to see him. He stated that he was under investigation by the O. P. A., that after previous difficulty with the O. P. A. his family had sold their business and intended to stay out until the end of rationing. At the end of the war, meat

became somewhat plentiful, temptation was out of the way, they returned to business and purchased the Pioneer Provision Company. He soon found his employees engaged in "petty black market activities." Kramer noticed that certain investigators of the O. P. A. "making a career of the Kramers, they were in and out of the Kramer establishment constantly. *There were turning up very petty violations, which parenthetically I might state were the sort of thing we ordinarily decline prosecution upon because they are de minimis.*" (Italics ours.) Transcript of Record, page 80.)

These investigators were constantly harassing Kramer on those petty violations. They suggested to him that he pay them a sum of money which he paid them. Tolin testified:

"Parenthetically, again, when Mr. Kramer mentioned this to me he wouldn't tell me, at first, who these men were. So finally I thought I recognized them from the method of operation, and things that I had heard. *I asked him to tell me in confidence, for the moment, who they were, and he told me, and he named men who were already under suspicion by our office.*" (Italics ours.) (Transcript of Record, page 81.)

Mr. Kramer was then taken to Mr. Carter and advised if he desired to make a full statement, to make himself available as a witness to provide full information to the investigators and that he would inform the Court of the extent of his cooperation. "We went

ahead and filed this information drawn by Mr. Horgan and filed it.”

Special investigators from one of the Government agencies talked to Kramer, went with him in the field; Kramer gave them the name of persons, places and acting on this information the Government investigators “proceeded to build something of a case against the particular individuals . . . those individuals were already under suspicion, they were dismissed from the Office of Price Administration. . . . Mr. Kramer was called one day. I called him and told him to come up to the office. We desired him to testify before the Grand Jury. He came in and said he couldn’t afford to go before the Grand Jury and give testimony; that he thought he should be kept in the background because of the fact that these people were people who if he stayed in business in a difficult meat situation again, it might be people with whom he would have to deal. I told him,

“Mr. Kramer you know that I am to finally inform the court or our office is to inform the court whether you cooperated with us. So he went in and testified.” (Italics ours.) (Transcript of Record, pages 82-83.)

Mr. Tolin further commented—

“I don’t know which—and in that conversation I stated to him that if he was disposed to continue in his cooperation, and if he wanted to have the government be agreeable, in the event the

court was interested in the government's position on a plea of *nolo contendere*, that it should be entered without further delay. Mr. Kramer came up that afternoon and entered his plea. . . . I talked with Mr. Marcus and Mr. Kramer. *Mr. Kramer was up and down the halls of the Federal Building constantly, largely at the request of the agents, many times on his own request. He was greatly apprehensive, and he kept asking us for assurance, and we kept assuring him that all we could do would be to inform the court of the extent of his co-operation.*" (Italics ours.) (Transcript of Record, pages 86-87.)

and again:

"MR. TOLIN: I had talked with Mr. Marcus about a *nolo contendere* plea at an earlier time. But Mr. Marcus—according to Mr. Kramer, Mr. Kramer said, 'Dave Marcus doesn't feel that I should be giving this co-operation to the government in your further investigation, and I would rather come in and deal with you alone'; which he did on many occasions." (Transcript of Record, page 88.)

and further:

"THE COURT: Mr. Marcus was his attorney you knew he was for a week before the plea of *nolo contendere* was entered?

MR. TOLIN: I didn't know who his attorney was. Mr. Marcus had been in to see me, one other attorney had been in to see me. Mr. Kramer would come in without them—

THE COURT: In any event you did talk with Mr. Marcus before?

MR. TOLIN: Yes I did.” (Transcript of Record, page 87.)

David Kramer was thereupon sworn and testified.

On May 28th 1946 the date of the filing of the information Kramer conferred with Mr. Tolin at his office in the Federal Building.

“A. I told Mr. Tolin that I had a story to tell him that was off the record, that I would like to talk to him and get [69] his advice on the matter, more or less to find out some information. And he says, ‘Well, what is on your mind?’

I told him that I was being checked on my O.P.A. dealings, and he said, ‘What is it all about?’ And I told him, ‘I will tell you what it is all about.’

This is the story I told him: We sold our plant to be rid of what O.P.A. was doing to our business and caused me to be in the predicament that I am in. I said we want to stay out of it. All I know is the meat business, that is all I have been in throughout my life, and my father. He has raised me in the meat business, and he has raised me as a good boy, not as a fellow that goes off the street or anything else. It is a business dealing that I have.” (Transcript of Record, page 91.)

“I told Mr. Tolin that that is the conditions that prevailed. We wasn’t buying any meat to speak of. We couldn’t get \$100 worth of meat, where our purchases were over close to \$60,000 a week. We couldn’t get \$100 worth of meat legally.

So these O.P.A. investigators come around, and they found me. They said, 'Why don't you go to work? Why don't you get some meat in here?' I said, 'I can't afford to put any meat in here with you guys watching me.'

I never saw them before up to that time. They never came around but once a week or once every three weeks, and there was only one thing to do, that is, to get some meat in that plant; we couldn't afford to go on like we were; so we got a little meat in there. When they saw some pork come in, they immediately saw me and they said, 'What is this piece of pork here? Spareribs are supposed to be three and a quarter pounds at 18¼ cents, and there is three and a half pounds, it [72] should be 18 cents.' I said: 'Well, I guess the checker missed that.'

THE COURT: You don't need to go into that. This is his reason for violating the law. It is what he told Mr. Tolin that you want to go into, Mr. Marcus. Direct him to that. He is only telling now why he violated the law.

MR. MARCUS: Your Honor, I don't believe he has admitted himself that he did it.

Q. By MR. MARCUS: Did you on any of these occasions make out these statements here or receive any overcharge or above-ceiling violation?

A. I did not." (Transcript of Record, pages 93, 94.)

"Q. By MR. MARCUS: No. The conversation that you told Mr. Tolin.

A. I told Mr. Tolin that they said they had a violation on me, had a few violations on me. They said they were going to take care of everything.

Q. Did you at that time know that these were violations of law?

A. No, sir, I did not.

Q. Is that the reason why you went to Mr. Tolin's office?

A. That is the reason.

Q. Now, did these investigators of the O.P.A. demand any money from you?

A. They did." (Transcript of Record, page 95.)

"Q. How much did he ask you for?

A. \$600.

Q. How much?

A. \$600.

Q. Did you pay him that amount?

A. I did.

Q. Then what did you do? Did you go to Mr. Tolin's office?

A. I did.

Q. Did you inform him of their actions?

A. I did.

Q. At the plant there?

A. I did.

Q. And their solicitation of money and your payment of money to them?

A. I did.

Q. How much money did you pay them altogether?

A. That was all there was to it, \$600." (Transcript of Record, pages 95, 96.)

“Q. All right. Did Mr. Tolin make any statement to you at that time about your co-operation with the government?

A. He did. He told me my co-operation has been fine so far, that he expects it and anticipates me appearing as a government witness. And I said I would.

Q. Now, did he request you to appear before the Grand Jury?

A. He did.

Q. Did you appear before the Grand Jury?

A. I did.” (Transcript of Record, pages 96-97.)

“Q. BY MR. MARCUS: Were there any inducements held out to you to bring the other witnesses or jobbers in to testify before the Grand Jury?

A. Mr. Tolin didn’t say I would get immunity; they said they would try to help me the best they could; and Mr. Jona Taylor, which was an investigator for the O.P.A., said, ‘You know that you won’t go to jail for this.’ He said, ‘I know you won’t.’ I had more or less his assurance, more than I did anybody else, but—

Q. Who was Mr. Jona Taylor?

A. He is the investigator that investigated against the [77] O.P.A. fellows.

MR. MARCUS: Can you give us his official position?

THE COURT: *Was that statement made in Mr Tolin’s presence?*

THE WITNESS: *Yes, sir, it was.*

Q. BY MR. MARCUS: *Who is Mr. Jona Taylor?*

MR. MARCUS: *Do you know what his official position is?*

MR. TOLIN: I don't know his full title. It is Jona, J-o-n-a.

MR. MARCUS: Is he with the investigating department of the O.P.A.?

MR. TOLIN: He works from Washington on investigation of special assignments. I think he is available here." (Italics ours). (Transcript of Record, pages 97-98).

Mr. Kramer testified that Attorney David C. Marcus had represented him prior to the filing of the information.

"Q. BY MR. MARCUS: After my retention you continued to confer with Mr. Tolin and the investigators of the O.P.A., did you not?

A. Yes, sir.

Q. And that was not in my presence, was it?

A. No, sir, it wasn't.

Q. Whenever *there was any* conversation respecting *your case with the investigators* or with the *office of the United States Attorney*, did you at any time or was I at any time invited by yourself or the United States Attorney?

THE COURT: *You don't need to go into that. If there is any matter here—that might be a matter to take up with the Bar Association; that isn't a matter before the court here.*

MR. MARCUS: All right." (Italics ours). (Transcript of Record, page 99.)

Kramer testified he had approximately 75 to 100 conferences with the representatives of U. S. Attorneys office, O.P.A. and the special representatives of the Government from Washington.

“Q. BY MR. MARCUS: Did you have any further conversations about your testimony in this case? Will you please tell the court at the time that you testified before the Federal Grand Jury in this case what statement was made to you and by whom and what representations were held out to you?

A. Well, there has been numbers of occasions that I [81] have been up at Mr. Tolin's office, and one occasion I just recall that Mr. Jona Taylor told me, in the presence of Mr. Ernest Tolin, he said, 'You know that Ernie isn't going to let you go to jail. I want the truth; I want to know all about this thing. I am going to tell you that.' He said, 'You know that.' And, of course, he has been over to my house, Jona Taylor has, and he said, 'just let me handle it and you won't have nothing to worry about.'

When I was told to appear before the Grand Jury, I said, 'I better call my attorney, Dave Marcus.' Mr. Tolin called me at my office and said, 'I want you to come up here and appear before the Grand Jury.' I said, 'I want to call my attorney, Dave Marcus.' He said, 'You come on up and let me talk to you first.' I was late getting up before 4:00 o'clock, and Mr. Tolin said, 'Come on in there; the Grand Jury is waiting for you.' I believe it was twenty after four. 'The Grand Jury is waiting for you.' I said, 'don't you think I

ought to consult Dave Marcus first?' He said, 'You have your right, but,' he said, 'the Grand Jury is waiting. We would like to get it over with now, Dave, I want your co-operation if I can get it.' I said, 'All right; here I go.' (Transcript of Record, pages 101-102.)

"MR. LIVINGSTON: Mr. Taylor's title is Special Agent in Charge, Special Intelligence Division of the Office of Price Administration. It is an organization, an investigative, organization within the Office of Price Administration, something apart from their ordinary investigators.

Q. BY MR. MARCUS: All right. Now, who sent Mr. Taylor [83] and Mr. Jonas to you?

THE COURT: Does he know?

Q. BY MR. MARCUS: Do you know who sent Mr. Jonas or Mr. Taylor to you?

A. Yes, sir.

MR. LIVINGSTON: May I interrupt? His name is Jona Taylor.

MR. MARCUS: All right.

Q. BY MR. MARCUS: Do you know who sent him to you?

A. Yes.

Q. Who did?

A. I was introduced to him in Mr. Tolin's office.

Q. What was said to you at the time?" (Transcript of Record, pages 103-104.)

"Q. BY MR. MARCUS: Did Mr. Taylor on more than one occasion advise you that you would not get a jail sentence in [86] this case?

A. He has.

Q. At this time and about this same date was there an indictment returned against you and your brother and the Pioneer Provision Company on the grounds of War Frauds or conspiracy?

A. There was.

Q. And at that time were you concerned with that matter?

A. I was.

Q. Were you worried and upset and disturbed about it?

A. I was.

Q. And at that time and about that date did you employ my services to represent you?

A. On that other case, yes.

Q. On the other case?

A. Yes.

Q. And did I continue to represent you during that entire matter, and was that indictment returned in this district and before this United States District Court?

A. It was.

Q. Now, you had a trial on that case, did you not?

A. I did.

Q. *And you were found not guilty?*

A. *I was.*

Q. Am I correct? [87]

A. That's right.

Q. Now, were you advised by Mr. Tolin or Mr. Taylor, or any other person, that this information was of trivial consequence, it was not important. Were you ever advised by any one of them?

A. I was, yes.” (Italics ours.) (Transcript of Record, pages 106-107.)

“Q. BY MR. MARCUS: (Continuing) — July 26th, do you remember being called by anyone to come to the United States District Court and enter a nolo contendere plea?

A. I was.

Q. *Who called you?*

A. *Mr. Ernest Tolin.*

Q. Where did he call you?

A. *At my office.*

Q. Did you make any statement to him at the time about your desire to confer with your attorney?

A. Yes. He said, ‘I have already called Dave Marcus; he will be down here.’

THE COURT: Who said that?

THE WITNESS: Mr. Tolin.

Q. BY MR. MARCUS: All right. Did you tell him that you wanted to confer with me before you came up to the court room?

A. I did.

Q. And what was stated to you?

A. Mr. Tolin said, ‘this is the best thing for you, and [89] this is what we would like you to enter into, and it has gone far enough, we can’t put it over another day, we want to enter it today.’ There was a rush, and you said to me, ‘Why is there such a rush about the thing today?’ And you said, ‘I want to know more about it.’ And we was outside here in front of this hall.” (Italics ours.) (Transcript of Record, pages 108-109.)

“Q. BY MR. MARCUS: Did you advise your attorney or did you yourself know before you approached the rostrum of the court that you would have to plead to six counts *nolo contendere* in this Information?

A. No, I was not.

THE COURT: Pardon me, Mr. Marcus. Don't take up the time with asking questions of that kind. You know the defendant didn't have to plead *nolo contendere* to any count, and you were present and he said nothing was said about it until he was here in court. That is just taking up time unnecessarily. As an attorney you know that wouldn't be proper here. [91]

Q BY MR. MARCUS: Tell the Court if it is not a fact that were it not for the representations made to you by the United States Attorney's Office, and the representative of the United States Attorney's office, that you would not have entered your plea of *nolo contendere* to this Information?

A. I would not have entered a plea of anything else but not guilty.” (Transcript of Record, page 110.)

On September 24, 1946, at 1:00 P. M. Mr. Tolin was requested to be sworn by the Court.

His testimony appears as follows (see footnote):

“Q. BY MR. MARCUS: Is it not a fact, Mr. Tolin, that I stated to you not once, but on several occasions, that I did not approve of any conversations regarding this case or any other case, or any statements by Mr. Kramer in the absence of his attorney, or any statements to the United States Attorney's office regarding the commission of any acts by any official of the United States Department of the O. P. A.?

A. You did come into the office on an occasion when Mr. Kramer was there giving us information. I stated to you that Mr. Kramer was in cooperation in

Jona Taylor, special agent of the O. P. A., testified as follows:

"A. We handle special investigations. That either may take in corruption within the O. P. A., or major price violations throughout the country.

Q. When Mr. Kramer began his co-operation with the government in discussing with Mr. Tolin bribes that he had paid to O. P. A. officials, it was your division that undertook the investigation of that matter?

A. That is true.

Q. And from that time on did you have conferences and discussions with Dave Kramer—

the investigation we were making of certain O. P. A. officials and you then said that you did not believe in people giving testimony against others with whom they had been associated, and you didn't favor Dave Kramer's giving us the information, and if he did it you didn't want to know about it. I think you then left.

Q. Now, is it not a fact that upon the date that this plea of nolo contendere was entered you called my office?

A. Yes." (Transcript of Record, pages 129-130.)

Q. Isn't it a fact that I stated to you at that time that I had no knowledge of the fact that he desired to enter his plea? You stated to me you discussed it on the telephone with him, and he would be up shortly before the court, and that I could meet him there and discuss the matter with him?

A. I don't recall whether I told you that we called him or not. In fact, I don't recall whether I told Mr. Kramer the time he was in. He was in and out of the office a great deal.

Q. Do you remember me making a statement to this effect: I said, "Mr. Tolin, do you know whether or not the court will accept a nolo contendere plea?" (Transcript of Record, page 130.)

Q. Do you remember making the statement in your office to me that you felt that this violation was a technical violation, that because of certain meats being cut in a certain manner that it was not on any serious consequence?

A. No. I told you that the men to whom Kramer had paid bribes had hounded him on *mere technical violations that wouldn't have been interesting to us anyway, but that that had been a means by which they brought to Kramer's attention the fact that they were there, were working on him, and opened up the way to an offer of a bribe.*" (Italics ours.) (Transcript of Record, pages 134-135.)

"THE WITNESS: I have said at times that so far as I was concerned I would be satisfied if Mr. Kramer received a substantial fine. I have said that. If that helps Mr. Marcus any. I want to be fair with what I have said." (Transcript of Record, page 135.)

THE COURT: I don't want to go into all of those matters. Just that one point. It will make the cross examination too lengthy.

A. Yes, I did." (Transcript of Record, page 138.)

He denied stating to Mr. Kramer that "Ernie won't let you go to jail." (Transcript of Record, page 139.) and further (see footnote):

"Q. Did he tell you at that time—did he say, 'Do you think I might get a jail sentence?'"

A. Yes, I think he did.

Q. And didn't you say to him, 'You co-operate with us in this matter and I am sure that Ernie won't let you down?'"

A. No, I did not say that. I can explain, I think, what I did say.

THE COURT: You may do that.

THE WITNESS: I told him that the only thing that we were in a position to tell him was that I was sure the United States Attorney's office would undoubtedly make known to the court the degree of his cooperation in helping clean up a stinking mess, if he did co-operate.

Q. BY MR. MARCUS: Did he co-operate?

A. He did to a certain extent, yes." (Transcript of Record, page 141.)

"Q. BY MR. MARCUS: Didn't you tell him that you would have to have his co-operation if he wanted to get any help from the government?"

A. I can say—I think I can recall the exact words I did tell him. They were if he was going to co-operate he would have to co-operate, and he couldn't go half way; that if the United States Attorney's office was to be in a position of telling the court that he had co-operated, he had to assist them [125] in such a manner that they would be in that position." (Transcript of Record, page 142.)

"Q. BY MR. MARCUS: Is it a fact that on the occasion that you were at Mr. Kramer's home and overheard certain conversations between him and the O. P. A. officials, after they had left you stated to Mr. Kramer substantially the following language: 'This was really a good deal. I got everything that we needed. You will certainly receive our help and co-operation, and don't worry about your case now?'"

A. No, I don't remember that conversation. There was some conversation, but not in those words, not quite to that extent.

THE COURT: What was it?

THE WITNESS: I told him that I thought we heard every word that had been said; that we were in a beautiful position to hear the entire conversation, and that he did engineer the [128] conversation just right to bring out all of the information he had given us. And Mr. Kramer asked me if I thought he was co-operating. I said, 'Yes, you certainly are, and I will make that fact known to Mr. Tolin, just exactly what has happened and how far you have gone; and I don't think up to this time that we could expect you to give further co-operation than you have to this point, but you are not through yet. Dave, there is lots more that has to be done if you are going to bring the whole thing out.'

A. Mr. Kramer told me that he was—a couple of days later, that he was not going to do anything further until his case had been disposed of, that he wanted his case dismissed before he gave any further co-operation. I said, 'Dave, I have told you before I have nothing whatsoever to do with your case, and that would be asking too much. Mr. Tolin told you he would not dismiss your case; the only thing he would do would make the fact known to the court your degree of

David Marcus, defendant's counsel, testified (see footnote):

"I stated to Mr. Tolin I didn't feel it proper that my client should go and discuss the matter with him unless it was in my presence, but if he wanted to continue the conversations with him, that was up to him.

During the course of the investigation and while the [131] investigation was proceeding I received a call from my client. I called Mr. Tolin after that and told him my client felt and had advised me that *he should be granted immunity on this particular case* because of his sincere co-operation with the government in the matters that they were investigating. Mr. Tolin stated to me that he didn't feel that he could grant him immunity on this case, but that he would give him all assistance possible.

I didn't hear much about it after that until one day I received a call from Mr. Tolin. He said, 'I have just talked to Dave Kramer, and this office is determined that we are not going to proceed—carry this case along any further, it is taking up too much of the routine of this office, and Mr. Kramer will have to enter his plea today.'

I believe that was early in the afternoon, your Honor, and it was after 2:00 o'clock.

I said, 'How could the court take the plea today?' I said, 'What plea is he going to take, and what counts is he going to plead to?'

He said, '*The government is willing to accept a nolo plea, and that he and Mr. Taylor had discussed the matter with the court and that the court was willing to accept a nolo plea.*

I said, 'Are you sure of that?' And he said, 'Yes, I am sure that we can enter a nolo plea.'

I said, 'I haven't discussed the matter with my client.' [132]

I said, 'I know that he has stated to me on several occasions that he wants immunity and he felt that this case should be dismissed, and that you felt that it was not of any serious consequence.' So he said, 'No, we are not going to carry this along any further; you will have to come up this afternoon. I have instructed Mr. Kramer to be here.'

So I immediately came up to this court room, and Mr. Tolin was here, and I began to discuss the matter with him. I said, 'Mr. Tolin, I am not in favor of entering this plea.'

He said, 'Well, Dave is and I think we ought to dispose of it.'

I said, 'I haven't had an opportunity of discussing it with him, what counts or what the plea should be.'

So he said, 'We are willing to take six counts on this matter.'

I said, 'If it is agreeable with my client, it is agreeable with me. Have you discussed the matter with him?' And he said, 'Yes, I have.'

I went over and talked with Mr. Kramer, and he said he didn't know what to do. He said Mr. Tolin called him and advised him he would have to enter his plea today.

And I went back to Mr. Tolin and said, 'Isn't it possible to continue this matter until morning and give me an opportunity to discuss this case with my client?' And he said no, he felt it had gone long enough. [133]

I said, 'Mr. Tolin, you know I am not acquainted with the details or facts of this case. Your office has been and now is in possession of all of the statements concerning the commission of these offenses, and I have no knowledge concerning the details of it.'

He said, 'It is not of serious consequence and we will make the statement known to the court.'

I said, '*Well, there hasn't even been any ruling—there has been no filing of that bill of particulars.*'

He said, '*It won't be necessary now.*'

So I said, '*What assurance can you give us that Mr. Kramer is not going to jail?*'

He said, '*We are going to make all the facts known to the court, and in our opinion we feel that Mr. Kramer will not go to jail.*'

I said, '*Can I convey that information to my client? You know he is very worried, and he has got these other cases?*'

And he said, '*Yes, you can.*'

So I went over and talked with Mr. Kramer, and Mr. Kramer stated, 'Well, how am I going to be sure about it?' And I said, 'I am not sure about it.'

So I went back to Mr. Tolin and I said, '*Mr. Tolin, I haven't discussed the matter with the court; you stated to me that you have; supposing the court does sentence him to jail,*' I stated, '*Would you have any objection or would you [134] object to the withdrawal of his plea?*' I said, '*He has been promised your co-operation, and you know he has cooperated, and the other officials as I have been advised, he promised his co-operation.*'

And he said, '*Yes, I am willing to do that.*'

So I went back and told Mr. Kramer, 'Now, it is up to you,' I said, '*I don't know what the facts even are about this case. I have never been furnished with a bill of particulars.*'" (Italics ours.) (Transcript of Record, pages 148 to 151.)

On cross-examination the witness testified (see footnote):

"Q. You stated that Mr. Tolin told you that, in your opinion, Mr. Kramer was not to go to jail, which Mr. Tolin has denied, and you have also told us that Mr. Tolin said that he would be willing to allow the plea to be withdrawn after it was entered, which Mr. Tolin has denied.

A. I don't think he has denied that. He says he did not remember. [138]

Q. Neither of those matters, Mr. Marcus, were called to the attention of the court yesterday, were they?

A. Yes, they were. Immediately at the close of this session we made the statement to the court, and Mr. Tolin stated he wanted to think about it over night. Do you remember that?

Q. I remember it. But it was not brought to the attention of the court yesterday?

A. Yes, it was." (Transcript of Record, page 155.)

"A. Yes; and I also advised my client, too, that I relied upon the representations of your office, and that I believed that he could rely upon the representations of Mr. Tolin.

Q. Which representation could he rely upon?

A. The ones that I have related from this stand; the ones that he has related from this stand.

Q. The representations that Mr. Tolin would call to the attention of this court, the degree of co-operation which Mr. [141] Kramer had given?

A. And that he would not go to jail.

Q. You mean to say as an attorney, Mr. Marcus, you relied on that representation?

The two witnesses Justo Briseno and William Henry Houser whom the Court directed the United States Attorney to produce, to testify concerning the transactions had with defendant, Kramer, over objection of defendant's counsel, that the guilt or innocence of the defendant was not involved in this motion and therefore the testimony was irrelevant were permitted to be sworn and testify (Transcript of Record, page 170) Briseno, a driver for the Pioneer Provision Company in their truck delivered certain meat items consisting of "2 small bolognas," on invoice No. 2405. (Transcript of Record, page 173.)

He paid \$19.76 for a hind of beef to the driver. About a month later he paid Dave Kramer \$3.12 at the Pioneer Plant.

"THE COURT: When you paid this three dollars and something that you say, three cents a pound to defendant Kramer, was there anything said by you or him at that time?

THE WITNESS: No, nothing. It was already understood that I was to pay three cents per pound on beef.

MR. MARCUS: I move that be stricken.

THE COURT: It may go out." (Transcript of Record, page 175.)

A. As an attorney I have relied upon the word and the representations of The United States Attorney's office. Otherwise I would not have permitted him to enter his plea of nolo in this case.

Q. Knowing that he could not bind the court?

A. Knowing that he could not bind the court. And knowing that the statement was made to me that there would be no objection to his withdrawal of his plea." (Transcript of Record, pages 157-158.)

On cross-examination the witness testified as follows (see footnote):

Not one word of testimony was given as to the ceiling price of the meat delivered; the grade of meat or any competent testimony that would assist the Court in determining whether or not there had been an actual over-ceiling violation.

"THE COURT: When you said 'paid over,' you mean paid over what?

THE WITNESS: Over ceiling, I imagine.

THE COURT: Let the imagination go." (Transcript of Record, page 178.)

"Q. BY MR. MARCUS: How many purchases approximately did [163] you make from the Pioneer Meat Company altogether and receive statements for them?

A. It is hard to say offhand by memory.

THE COURT: Well, approximately.

THE WITNESS: About seven or eight.

Q. BY MR. MARCUS: How many times have you seen Dave Kramer?

A. About four or five.

THE COURT: Did you pay him money each time?

THE WITNESS: When I went to the plant I did, yes.

THE COURT: Well, the four or five times you saw him, did you pay him money each time, or did you not?

THE WITNESS: Yes, I went to settle for the meats that were delivered to me." (Transcript of Record, pages 178-179.)

"Q. BY MR. MARCUS: Now, let me ask this: You say you only paid it over on beef?

A. On beef only.

Q. Do you know that it was over the ceiling price? Yes or no.

A. Yes.

Q. How do you know that?

A. According to the price of the meats. All grocers are well informed on prices.

Q. Did you check the prices on beef on February 18, 1946?

A. I believe I did, yes, at the time.

Q. Did you?

A. I did.

Q. Where did you check them?

A. In the list the O. P. A. sends out.

Q. And how much was it at that time?

A. I don't recall. Seventeen or eighteen cents.

Q. Seventeen or eighteen?

A. Well, that is just guessing.

THE COURT: He said he doesn't remember.

THE WITNESS: I don't remember." (Transcript of Record, pages 179-180.)

The testimony of William Henry Houser was less intelligent than the former witness. He testified (see footnote):

At the close of argument by both Government and defense counsel the rulings were continued on three occasions until October 2, 1946—when all motions were

“Q. Is it also true that you don’t know what the ceiling was on all of the invoices?

A. I don’t know what the ceiling was on those invoices, but I presume that the Pioneer was charging ceiling.

MR. MARCUS: I move that the latter part be stricken as calling for his conclusion.

THE COURT: The motion is denied. You asked him about it and he gave his explanation. He presumed, he stated, at the time that he bought the meat that the ceiling price was charged by the Pioneer.

Is that what you paid the cashier?

THE WITNESS: Yes, your Honor, I did.

THE COURT: Then you went over and paid Dave Kramer?

THE WITNESS: Dave Kramer, on the side, yes.

Q. BY MR. MARCUS: Who told you that it was ceiling?

A. I said I presumed it was ceiling on the invoice.

Q. Did any one tell you that it was ceiling?

A. No, no one told me.

Q. Dave Kramer didn’t tell you that it was ceiling, did he, on the invoice? [177]

A. No; but he told me that it was overage, in that cooler.” (Transcript of Record, pages 190-191.)

“Q. BY MR. MARCUS: The question was you don’t know and didn’t know at that time what the ceiling price was?

A. That’s right, and I still don’t know today what the ceiling price of beef is, pork or ham.

Q. Do you know or did you know at any time that there were different grades of beef?

A. Sure, I knew there were different grades of beef.

Q. Did you know and do you know now that there were different prices for different grades of beef?

A. Sure, there are different prices for different grades. [179]

Q. As to any of the grades of beef, you have no knowledge now or never did have any knowledge concerning the ceiling price of that particular grade of beef?

A. I don’t get your question.

Q. You don’t know now and you never knew what the ceiling price was of the different grades of beef?

A. I don’t recall the prices on the ceiling prices of different grades, no.” (Transcript of Record, pages 192-193.)

denied and defendant ordered committed. Appeal was immediately filed and defendant released upon posting \$5,000 bail pending appeal.

We do not desire to unduly argue this point as we have incorporated all the evidentiary facts in this brief and our argument on this point was amply set forth in the Transcript of Record, pages 194 to 215 and pages 226 to 232 which we beg this Court to read.

We earnestly believe that under the authority of *Ward vs. United States*, 116 Fed. 2d 135; *Bergen vs. United States*, 145 Fed. 2d 181; *People vs. Schwarz*, 201 California Reports 309; *People vs. Campos*, 3 Cal. Reports 2d 15, the motion to withdraw the plea should have been granted.

The *Bergen case supra* is particularly in point. Defendant was charged with mail fraud and conspiracy. He first entered a plea of not guilty.—“Counsel for the United States thereafter sought to induce him to change his pleas and testify against others considered more deeply involved. They promised to recommend a sentence that would involve no imprisonment and assured appellant that pleas of guilty would result in no more than a fine or suspended sentence or both *though they could not state definitely what punishment would be imposed.*” (Page 136 of the Opinion.)

Defendant changed his plea co-operated with the “Government” and appeared and testified for the Government.

These facts are identical with the instant case.

The Court refused to follow the recommendation of the probation officer in the *Kramer case* recommending a fine and *no imprisonment* and the suggestion of the United States Attorney for a fine. (Transcript of Record, page 243.)

In the *Bergen case supra* the lower court refused to follow the recommendation and sentenced the defendant to prison. Permission to withdraw the plea was denied.

The Court through Justice Arant reversed the lower court and stated:

“[1] We do not find that this question has been decided by any federal appellate court. The prevailing view, however, appears to be that the trial court’s denial of leave to withdraw a plea of guilty is examinable on review to determine whether such denial is in accord with the exercise of a sound judicial discretion. *State v. Maresca*, 85 Conn. 509, 83 A. 635; *Gardner v. People*, 106 Ill. 76; *Myers v. State*, 115 Ind. 554, 18 N. E. 42; *Little v. Commonwealth*, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A., N. S., 257, Ann. Cas. 1912D, 241; *State v. Hill*, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687.

[2] It is not error to refuse leave to withdraw the plea if the defendant fully understood his rights, the nature of the charge against him, and the consequences of such a plea. *Miller v. State*, 160 Ark. 245, 254 S. W. 487; *Pope v. State*, 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972; *State v. Raponi*,

32 Idaho 368, 182 P. 855; *State v. Williams*, 45 La. Ann. 1356, 14 So. 32; *Hubbell v. State*, 41 Wyo. 275, 285 P. 153. On the other hand, it is error to deny leave to withdraw the plea when it was entered because of misunderstanding of its effect or because of misrepresentation. *Krolage v. People*, 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235; *Mounts v. Commonwealth*, 89 Ky. 274, 12 S. W. 311, 11 Ky. Law Rep. 474; *State v. Nicholas*, 46 Mont. 470, 128 P. 543; *State v. McAllister*, 96 Mont. 348, 30 P. 2d 821. There is ample precedent among the state court decisions for the view that it is reversible error to refuse leave to withdraw the plea under circumstances such as appear in the case at bar. *Griffin v. State*, 12 Ga. App. 615, 77 S. E. 1080; *East v. State*, 89 Ind. App. 701, 168 N. E. 28; *State v. Stephens*, 71 Mo. 535; *State v. Cochran*, 332 Mo. 742, 60 S. W. 2d 1; *Sloan v. State*, 54 Okl. Cr. 324, 20 P. 2d 917."

VI.

THE SENTENCE IS EXCESSIVE

Mr. Tolin stated to the Court that the offense was a “very petty violation, which parenthetically I might state was the sort of thing that we ordinarily decline prosecution upon because it is *Deminimis*.” (Transcript of Record, page 80.)

Mr. Livingston, United States Attorney, admitted to the Court that even under the Government position “the whole thing didn’t amount to very much, \$150 as to all six counts. With that I agreed.” (Transcript of Record, page 222.)

To fine a man \$3,000 and one year in jail to a “*Deminimis*” charge “petty violation” involving \$150 is to our mind a very severe sentence, and we respectfully believe should be permitted to stand in view of the entire record of this case and the recommendation of the Probation Officer. Probation Officer’s report, Transcript Report, pages 207-210 inclusive.

We respectfully submit that the motions be granted and the cause reversed.

DAVID MARCUS,
Attorney for Appellant, David Kramer.



No. 11,443

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LUCIEN P. BRASSY, upon his own behalf
and upon behalf of Robert P. Easley
(deceased) and Lucien P. Brassy, as co-
partners doing business under the firm
name and style of Easley & Brassy,

Appellant,

vs.

THE PERMANENTE METALS CORPORATION
(Richmond Shipyard Number Two), (a
corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

FILED

MAY 26 1947

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IN THE

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APPELLANT'S REPLY BRIEF.

COMMENTS ON ERRORS IN APPELLEE'S BRIEF.

In footnote (7), page 5 under heading A. Questions Involved and Manner in which Raised the Appellee makes the following quoted statement:

“Second, at no time previously, either in the pleadings or during the trial of the case or the arguments before the Court, has the Appellant raised the question of the applicability of Maximum Price Regulation No. 134 to this case.”

The Appellee clearly is in error in this statement. In oral argument before the lower Court, transcript of which was made at the request of the Court, Mr. Winters, counsel for the Appellant, made the following statement:

“Now, in the agreements the plaintiff also agreed to hold the defendant free and harmless from any and all claims for loss or damage to the leased property, and the defendant assumed all risks and hazards of loss and damage to the leased property during the entire terms of the agreements. In addition to these commitments, warranties and obligations on the part of the plaintiff, a further obligation was imposed upon the plaintiff by a separate OPA regulation identified as Regulation MPR No. 134, relating exclusively to the rental of equipment such as that involved in this case. By the terms of section 1399.14 of this regulation No. 134, the plaintiff in this case was obliged to make and pay the cost of repairs and overhaul required as a result of normal wear and tear, and the plaintiff lost the rental of the equipment during the time while the repairs were being made.

Now, this provision of the OPA regulations supersedes any contrary provisions in a contract between the parties. By express provision of law, section 4(a) of the Emergency Price Control Act of 1942, as amended, the regulations are made to supersede any contrary provisions in a contract between the parties.

These promises and obligations of the plaintiff in this case are certainly more definite and extensive than the vague guarantee referred to in the regulations.

Superadded to all of these commitments on the part of the plaintiff is the fact that in each case, with respect to each of the machines, they did perform satisfactorily in every respect for periods of sixty days and much longer after delivery to the defendant."

In response, Mr. Johnson, counsel for the Appellee, stated in part "Well, it is true what Mr. Winters says about the OPA regulation 134 and the rental of construction equipment, but I think the point he misses there is that the OPA regulation is that there should be a binding written guarantee, not a guarantee imposed by law."

Later, and during the same oral argument the counsel for the Appellant amplified his statement as follows:

"And another point is raised by Mr. Johnson regarding the provision of the contract and each of the contracts to the effect that the company shall make repairs necessary to maintain the property in good operating condition, provided that such repairs are made necessary by normal operation, and bear the cost of fuel, lubricants and supplies necessary for the operation of the leased property by the company. I should like to again emphasize that that provision is not binding under section 4(a) of the Emergency Price Control Act of 1942, as amended. I will read the portions that are applicable to this situation.

"It shall be unlawful, regardless of any contract or agreement or other obligation hereinafter entered into for any person to omit or do

'any act in violation of any regulation or order under section 2, or of any price schedule,' and so on.

So that by that express provision of the statute this provision would not be the binding provision, but the one that is set forth in regulation 134, requiring the plaintiff to make all repairs, including those that are occasioned by normal wear and tear" would prevail.

(See page 12, line 19 to and including line 22, page 13; lines 16 to 20, inclusive, page 28; and lines 1 to 21, inclusive, page 42, of typewritten Reporter's Transcript, Monday, December 10, 1945, not printed in the Record.)

In the Statement of Issues on pages 9 and 13, and in the Argument on page 65 of its brief the Appellee sets out a portion only of the testimony of a witness relative to the cost to the Appellant of the larger crane. The Appellee in its brief presents this portion of the testimony as the complete evidence on the matter. It should be obvious that the evidence relative to the cost to Appellant of the crane is completely immaterial to the case. The admission of this evidence was objected to on that ground at the trial, but it was admitted, nonetheless, in error, by the Court. Specifically, on page 9 of its brief, the Appellee states: "The larger crane was a used crane purchased by Appellant in May or June of 1942 (at which time it was approximately 4 years old) for which Appellant paid \$14,000.00. (R. 254.)" At page 13 of its brief the Appellee says: "All of this for a used

Crane which, as noted above, Appellant bought for \$14,000.00 in 1942.” On page 65 of its brief the Appellee says: “Appellant testified that a year before he rented the crane to Appellee he paid \$14,000.00 for it. (R. 254.) It does not seem likely that after a year’s further use the crane had increased in value in an amount greater than \$10,000.00.” The correct testimony of Appellant on this point we find, by reference to page 254 of the Record, to be as follows: “Q. What did you pay for it?” (meaning the crane.) “A. The crane f.o.b.” (transcribed in error “Ethel B.”) “Winnemucca was \$14,000.00.” In addition to this, it was testified that the crane was transported to San Francisco and overhauled (R. 281) after the original purchase by Appellant, and that a lot of work was done on the machine and the machine put into condition to operate in a manner substantially equivalent to a new machine (R. 326) and maintained in that condition (R. 315) and that the ordinary life of the machine in good working condition was around 20 to 25 years (R. 264)—that the machine was not built for a year or so’s wear, and was not like an automobile.

The Appellee’s emphasis on the partial evidence of cost represents an obvious effort to appeal to prejudice even though the evidence shows clearly and the Appellee stipulated at the trial that the OPA new base price for the crane was \$35,320.00 (R. 311-313) and the Appellee has admitted throughout the proceedings that either 85% or 55% of the new base price is applicable in this case.

On page 6 of its brief the Appellee refers to "the shipyards at Richmond, California, which it was operating for the United States Maritime Commission." The only evidence in the record is that Appellee was operating the shipyard for itself, and it is common knowledge that it did so at a handsome profit to itself. Appellant's contracts were with Appellee only and the evidence in the case shows only that the Maritime Commission had a contract with Appellee for the supplying of certain construction work and products.

In its statement of the issues on page 15 of its brief the Appellee states: "Appellee (meaning Appellant) is not entitled to reformation because the written contract" (referring to the 3 months extension agreement identified as Change Order No. 1) "reads exactly as it was intended to read and there is no mistake in its terms." The statement is repeated in substance in Appellee's argument. That statement is not true unless the following proposition is correct, namely, that the phrase "Except as herein modified the terms and conditions of said Rental Agreement No. PD-482, dated May 4, 1943, shall continue in full force and effect" contained in said Change Order No. 1 (R. 38, 39) does carry over to apply throughout the extended period the null and inoperative recapture clause, contained in the original rental agreement, which Appellant contends that it does in accordance with the agreed intention and understanding of the parties. The inoperability of the recapture clause was as much a term and condition of the original lease as any other contained therein. Should that not be the conclusion of this Court then obviously the

language of the Change Order failed to express the intention of the parties in a most material respect (R. 142, 143, 144, 289, 290, 297) and the omission was due to the mutual mistake of the Appellee and Appellant. (R. 150, 151, 294.)

The OPA Regulation Issue.

The Appellee drafted the so-called rental-purchase agreements involved in this suit. (R. 144, 288, 289, 292.) The Appellee checked the prices stated in the agreements to determine that they did not exceed the Maximum OPA prices. (R. 301.) It is unconscionable now to permit the Appellee to get away with machinery having an aggregate value in excess of \$41,000.00 (R. 68, 69, 71, 164, 311, 312, 313) by permitting Appellee to say that it failed to include in the agreements that it prepared the words "satisfactory operation guaranteed for 60 days" when the uncontroverted evidence in the case shows clearly and convincingly (1) that the machines did operate to the entire satisfaction of Appellee, and as well or better than new machines, for periods greatly in excess of 60 days after delivery to it (R. 263, 264, 265, 266, 268, 309, 310, 315, 323, 324, 325, 326) and before exercise of the option to purchase the smaller 602 crane was attempted, (2) that Appellant was required under OPA Regulations 134 to make and did make all repairs even though occasioned by normal wear and tear (R. 323, 324, 325, 326, 329), (3) that Appellant warranted in writing that the cranes were in good operating condition when delivered to Appellee and if at any time, not just for 60 days, 6 months or a year, but

any time there should be discovered broken, defective or badly worn parts existing at the time of delivery of the cranes, the Appellant would correct such defects and/or pay all the costs thereof (R. 17, 18, 30), (4) that the Appellant held Appellee free and harmless from any and all claims for loss or damage to the cranes (R. 18, 19, 31), and with respect to the larger 701 crane that Appellant told Appellee that "if there was anything wrong with the machine or anything that he" (Appellee) "found after he" (Appellee) "got over there" (meaning Appellee's shipyard) for Appellee to use its own discretion and Appellant would stand the bill (R. 326), and under the express terms of each of the agreements the Appellee, The Permanente Metals Corporation (but not the Appellant), could terminate the rental agreements on 7 days notice for any reason or for no reason whatever. (R. 16, 30.)

The OPA Regulation 136 does not apply to this case.

The point that Appellee misses in contending in its brief that OPA Regulation M.P.R. 136 controls the agreements involved in this case is this: All payments made by Appellee to Appellant (with the exception of the final tender of \$736.56 to purchase the smaller 602 crane and some additional equipment (R. 124, 125), and the final tender of \$2,098.07 to purchase the large 701 crane and additional equipment) (R. 160) were rental payments, originally and entirely for all purposes, and these payments were not payments singly or in the aggregate of purchase prices. This is clearly the case with respect to the larger

701 crane because the agreement relating to this crane expressly provided for no payments other than rental payments. There was no option or right granted to Appellee in that agreement or its extension to purchase the large crane. In fact, the understanding and agreement throughout was that the large crane was not to be sold. An inoperative recapture clause was put into this agreement simply to comply pro forma with a request of the Appellee. With respect to the smaller 602 crane, the Appellant simply agreed in effect, and at the request of Appellee, which he was not required to do by any law or regulation, OPA or otherwise, to reduce the purchase price by the amount of the rentals paid prior to the exercise of an option to purchase. The Appellee paid rentals in the aggregate amount of \$14,880.69 for the use of this crane, and then tendered as purchase price for the crane and additional equipment only the remaining amount of \$736.56. The tender of \$2,098.07 with respect to the larger crane and additional equipment was made specifically by the Appellee as purchase price. The Appellee was not entitled to purchase this crane and equipment and the Appellant was entitled to claim or collect no purchase price for the same, but only rentals. To this day Appellee admits ultimately and in effect that rentals in the aggregate recapture value of \$24,000.00 have neither been paid nor tendered. The entire record bears this out. The OPA regulations do not and did not prohibit the renting of cranes. They simply prescribed maximum rentals where a lease was made. Neither the OPA nor any

other regulations or laws required a recapture clause or option to purchase to be included in a rental agreement of the kind involved in this case. The Appellee, and mind you not the Maritime Commission, but the Appellee without the further consent of the Maritime Commission, could have cancelled both the rental agreements any time after the first week and before rentals reached recapture values, and it would have suffered no loss but would have been in a position of having paid only the reasonable and prescribed OPA rentals for the use of the machines.

If we take Appellee's view of the agreements, namely, that they were agreements to sell for prices in excess of those permitted by the OPA Regulations, then we find the Appellee still thwarted in its attempt to get away with property worth more than \$41,000.00 because such agreements insofar as they are agreements to sell would be unlawful and therefore void, and Appellee would be entitled to take nothing thereunder. The agreements were made and were to be executed within the State of California and they would be controlled, therefore, by the laws of that state which, on this point, provide as follows:

"Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (See The Civil Code of the State of California, Section 1599.)

"The illegality vitiates the contract between the immediate parties, as well as in respect to third

parties.” (See 6 *Cal. Jur.* 150, Sec. 106, and cases therein cited.)

The validity of the agreements as rental contracts or leases is beyond question and is admitted by all parties, and enforceable as such and only to that extent.

“* * * it is both familiar and declared law that where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the rest. The valid portion of a demand may be enforced where separable from that part which is void.” (See 6 *Cal. Jur.* 149, Sec. 105.)

Moreover, the impossibility of the application of MPR 136 to the transactions in this matter is apparent under Appellee’s theory of the case for the Appellee states in its brief on page 28 that “M.P.R. 136 is concerned with the price which may be charged by a seller of machines, and requires that if the seller wishes to charge a maximum of 85% rather than 55% of the new base price, he *must* guarantee that the operation of the machine will be satisfactory for a period of not less than 60 days *following the passage of title.*” The fallacy of this lies in the fact that under the terms of the particular agreements in this case the machines were delivered to Appellee on a rental basis in the beginning. Thereafter and for the terms of the agreements Appellant was not entitled to possession of the machines or to deal with them in any respect. The Appellant had no access to

the machines and was not in a position any time during that period to recondition, repair or rebuild the machines as required under OPA Regulations 136, and yet it rested within the power of Appellee with respect to the smaller crane to cause a sale to take place at any time during the period that it chose, and with respect to the larger crane under Appellee's theory of the case, to hold onto the crane during the extended period, until the recapture clause effected a sale. It was impossible under these circumstances for the Appellant to meet the requirements of the regulations as Appellee interprets them. An 85% sale never could be effected under such conditions. The law never requires impossibilities and an interpretation which gives effect is preferred to one which makes void. The chief counsel of the Machinery Branch of OPA held that the condition of the machines and the obligations under the lease at the time of delivery was controlling, and stated:

"We believe it is sound to find the guaranty requirement satisfied where a co-extensive obligation is imposed even though not entitled 'guaranty'.

The above reasoning would not apply where an option to purchase was exercised in less than sixty days, since there would have been no sixty-day period of responsibility for the lessor."

Appellee is incorrect in its contention that the 55% price should apply.

The OPA Regulation 136 will have to be read as it was when the transactions took place, and not as Appellee would like to have it read. It is an admitted

fact in this case that the regulation established at least an 85% ceiling price for a rebuilt machine, whether it was guaranteed or not, on the date the transaction took place with respect to the larger 701 crane. The regulation stated clearly and unequivocally,

“The maximum price for any rebuilt *or* guaranteed second-hand machine or part shall be the *higher* of the following:

(1) 85% of the new base price for such machine or part, or”

(2) (a depreciation method of pricing with which we are not concerned in this case.)

The Appellee pleads to this Court to hold the Appellant to all the hypertechnical provisions of the regulation, whether reasonable or not, excepting, mind you, just the one only that defeats its case.

Further, Appellee argues that OPA rental regulation M.P.R. 134 had no bearing upon the issues in this case. The Appellee states “The coverage of M.P.R. 134 and M.P.R. 136, respectively, demonstrates that they are concerned with entirely different types of transactions. M.P.R. 134 has to do only with the obligations of a lessor under a rental arrangement. M.P.R. 136 is concerned with the price which may be charged by a seller of machines,” etc. This is not so. The two regulations are interrelated and have reference specifically to similar subject matter. The coverage clause of M.P.R. 136 (Art. I, Sec. 1) states in part:

“Scope — (a) Commodities and transactions. Except as provided in the next Section 2, this regulation establishes maximum prices for all sales, rentals and leases of unused or second-hand products that fall within the groups listed in Appendix A.”

Section 2 does not except crawler cranes, and Appendix A lists crawler cranes. M.P.R. 134 supplements M.P.R. 136 by prescribing rental ceiling prices, and M.P.R. 134 provides in part at Section 1399.5 (e) thereof as follows:

“The provisions of Section 1390.25a (b) of Maximum Price Regulation No. 136, as amended—machines and parts, and machinery services—are hereby incorporated herein as a part of this regulation.”

The Appellee calls Appellant’s argument “a bit vague”, and the Appellee purports to set forth in its brief the “pertinent provisions” of M.P.R. 134. After reading Appellee’s quotation of “pertinent provisions” the advisability of our quoting the entire section referred to is apparent, which we do as follows:

“Sec. 1399.14. Rental Rates—General Provisions.—Rental rates as set forth in the following Tables of Rates (Secs. 1399.15 and 1399.16) are for ‘bare’ equipment, unless otherwise specifically provided, and do not include charges for operator, mechanic, oiler, fuel, oil, lubricants, repairs, or maintenance (except repairs or maintenance due to normal wear and tear), or any other charge, which is properly a part of any ‘operating and

maintenance service,' as herein defined. The rental rates set forth in these tables do include allowance for the cost of all repairs and overhaul, required as a result of normal wear and tear of equipment. This means that: (a) When equipment is on bare rental and breaks down as a result of normal wear and tear, lessor cannot charge lessee with the cost of repairs, or any rental for time lost while repairs are being made. (b) Where equipment is on bare rental and breaks down as a result of any cause other than normal wear and tear, lessor can charge lessee with the cost of repairs and with rental for possession of equipment during time while repairs are being made. (c) However, where equipment is on bare rental, the lessee may at his own expense always make minor repairs, regardless of the cause of breakdown, where such repairs are necessary to keep the job going, but he may not charge the cost of such repairs to the lessor, or deduct the time lost for making repairs from the rental period, without the lessor's consent. (d) In any instance where there is a breakdown of equipment on bare rental, the cause of such breakdown is a question of fact that must be determined between the lessor and the lessee. (e) In any instance where there is a breakdown of equipment on fully operated rental, the lessor cannot charge the lessee with any rental, or for any operating and maintenance service, for the time lost during the breakdown, or with the costs of any repairs occasioned thereby."

The "bare" rental rates were agreed to be paid in the contracts involved in this case. Those rental rates,

therefore, compensated appellant for repairs and maintenance due to normal wear and tear. To keep the machines running and collect the prescribed rentals, which he did, the Appellant was required to and did make all repairs and do all maintenance work due to normal wear and tear, as the record will show, and the Appellee was in a position at all times to require the Appellant to so do.

PRICE ADMINISTRATION RULING.

The Appellee refers to "the ruling of the Office of Price Administration". (Appellee's Brief, page 31.) The letter of the OPA was not a ruling. As was stated by the Court in *Southern Goods Corporation v. Bowles* (C.C.A. 4, 1946), 158 F. 2d 587, 590:

"Being merely a letter of advice with regard to the administration of the act promulgated by assistant general counsel for the guidance of price attorneys operating under the office, it is not entitled to the weight that the courts accord to an administrative interpretation evidenced by settled administrative practice."

TITLE DID NOT PASS UPON PAYMENT EQUALLING THE SELLING PRICE.

The Appellee cites the *El Paso Furniture Company* case and the *Scott Furniture Company* case in support of its contention that upon payment of a sum of money equalling the selling price, title passed even

though the contract provided for the payment of a larger sum. (Appellee's Brief, pages 33, 34.) These cases are not applicable. In both of them the plaintiff sought equitable relief to which it was entitled only if such relief were consistent with the statute, and since the plaintiff had collected the selling price, it was entitled to no relief. In both cases the relief was sought from a purchaser for consumption who was entitled to protection under the OPA. In the case at Bar the Appellant sought relief both at law and equity from a purchaser in the course of trade and business who was not entitled to protection, but had a duty coequal with that of the Appellant to ascertain and comply with the requirements of the OPA. The first and second causes of action are at law and the principles set forth in Appellant's Opening Brief, Argument II at page 42 are controlling.

So far as the relief sought in the third and fourth causes of action is concerned, if the contracts did provide for payment in excess of the ceiling established by OPA and if the Court should decide that they are illegal contracts for that reason, then equity would leave the parties as it found them and the Appellee would not be entitled to recover upon its counterclaim. *Enterprise Frame & Novelty Corp.* (1944), 183 Misc. 3, 49 N.Y.S. (2d) 860; *Morgan Ice Co. v. Barfield* (Texas, 1945), 190 S.W. (2d) 847. In the latter case an action was brought upon a contract to recover damages for the breach thereof by a purchaser against his vendor. The purchaser who had agreed to purchase at a price in excess of the ceiling

established by OPA was engaged in business and the purchased product was for resale in business. The Court, in reversing a judgment for the purchaser, said at page 848:

“The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves.”

The United States Maritime Commission was not a party to the contracts.

The Appellant is asking for no relief from or remedy against the Maritime Commission. The Maritime Commission is not a party to the contracts and for that reason alone may not be made a proper party to an action founded upon the contracts. The only remedies Appellant asks are of the wrongs of Appellee because it is the only party with whom privity of contract exists.

Appellee's position essentially is this: Because Appellee insisted (for its part and in its own interest alone for the reason that the Maritime Commission apparently was policing the actions of Appellee, one of its war contractors), that the Commission approve the agreements, and the Commission did approve them in so far as its war contractor was concerned, that therefore Appellee is entitled to violate the contracts in any and all respects and claim immunity from

all justice and recourse because Appellant may not sue the government.

The record shows nothing more than that the purpose of the vesting of title in the Commission upon complete performance of the contracts, and the initial approval of the contracts by the Commission, were merely to permit policing by the Commission of the actions of its war contractor.

In any event, no rights of the Maritime Commission could attach or be involved unless or until the contracts have been completely performed according to their true tenor, and that is what all the argument is about—whether or not the contracts have been so completely performed. That question can and of necessity must be determined in an action between the two contracting parties only. If the contracts have been completely performed title vests automatically in the Commission and no recourse has been requested by the Appellant in such event and none could be granted. If the contracts have not been completely performed according to their true tenor then no rights of the government are involved. We need not turn back in our search for an answer because this war contractor in his bewildered retreat snatches what he thinks is the nearest American flag and waves it in front of himself.

RESCISSION AS AFFECTED BY THIRD PARTY BENEFICIARY.

APPELLEE'S AUTHORITIES.

The *Jurgens Co.* case cited by the Appellee (Appellee's Brief, page 41) as authority for the proposition that voluntary rescission cannot be effected except with the consent of a third party beneficiary who has accepted the contract is not authority for that broad proposition. In that case the insured sought to rescind an insurance contract upon the ground of fraud. The Court noted that the offer to rescind was an offer to release the opposite party, the insurer, from the obligations of the contract. The Court noted further that the obligation imposed by the contract upon the defendant insurer was to the plaintiff, the insured, and his wife, the beneficiary, and held that both should join in demanding a rescission, for though the husband could release for himself, he could not release for his wife. That case is distinguishable upon the facts, for here under the contract sought to be rescinded, the defendant had a unilateral obligation. Under the contract sought to be rescinded in this action, no obligation to the United States was imposed upon the defendant.

A. L. R. Annotations (Appellee's Brief, page 41.) The annotations cited, namely 53 A. L. R. 181 and 81 A. L. R. 1294, do state that after acceptance by a third party beneficiary, the contract cannot be rescinded by the parties thereto, "*so as to deprive him of his benefits.*" (Emphasis added.) (53 A. L. R. 181.) Appellant has repeatedly admitted and asserted

that it does not seek to deprive the United States of any benefit it may have acquired under the contract.

State v. Hyde (Appellee's Brief, page 44.) This case is distinguishable for the reason that the action was for cancellation of a deed from the State of Oregon to an individual grantee who subsequently deeded to the United States. It was properly held that the United States was a necessary party for no other relief was sought in that action. In the action at Bar monetary relief in the alternative is sought.

Palmer v. Lantz (Appellee's Brief, page 45.) In this action, as in the action in the case of *State v. Hyde*, the only relief sought was the cancellation of a deed. No monetary relief was sought. The judgment for cancellation was entered upon the default of the grantee and the court held that the default should be set aside.

**APPELLANT'S EVIDENCE OF MUTUAL MISTAKE
IS BINDING UPON THE COURT.**

(Appellee's Brief, page 46.) The statement of the law appearing in the *Jurgens Co.* case (Appellee's Brief, page 46) does correctly state the law that testimony need not be accepted merely because it is not disputed or contradicted by the testimony of other witnesses, but testimony must be accepted unless contradicted, although to be sure, the contradiction may be found in its inherent improbability, the interest of the witness or the circumstances present in the case, but unless there be contradiction in some form, the

disregard of such testimony is arbitrary. As stated by Judge Woodrough in *Twentieth Century-Fox Film Corp. v. Dieckhaus* (C.C.A. 8 1946) 153 F. (2d) 893 at page 899:

“Although our circuit has not had occasion to declare the law in cases involving plagiarism, it is thoroughly committed upon mature consideration to the doctrine that the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or, if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.”

This Court has, in effect, announced the same rule in *Riggle v. Janss Inv. Corporation* (C.C.A. 9 1937) 88 F. (2d) 111, 116, in which the Court stated:

“The only testimony as to that value is the testimony of the plaintiff. This is uncontradicted and must be assumed to be the reasonable compensation for the services performed by the plaintiff in the renting and collection of the rental of the apartments, and the general supervision during the period covered by the findings of the special master.”

In *Joseph v. Village of Downers Grove* (C.C.A. 7 1939) 104 F. (2d) 974, 978, the Court stated:

“No doubt, oral testimony offered to meet an exigency arising in a law suit, such as we find here, should be received with caution, and perhaps viewed with suspicion, especially where the testi-

mony concerns an event alleged to have happened many years in the past. If such testimony comes from a responsible source, however, is positive in its character as it was here, especially when not contradicted, we see no reason why it should not be accepted as establishing the fact. Certainly, a court is not justified in arbitrarily refusing it."

The Appellee's argument on pages 49 to 55, inclusive, of its brief to the effect that there was no mistake made in the execution of the extension agreement identified as Change Order No. 1 represents a desperate attempt to accomplish legal alchemy—to distill gold out of a very base substance indeed. The Appellee describes the Appellant as "a smart businessman of some thirty years' experience" (page 53), and then spins a fanciful yarn based upon partial quotations and references to statements wholly out of context to induce this Court to believe that Appellant, "a smart businessman" would knowingly and without mistake turn over a heavy construction machine which even Appellee admits was worth in excess of \$32,000.00 (R. 213, 214) for approximately \$9,000.00 in additional rentals. The Appellant on cross-examination testified as follows:

"Q. Did you give any consideration at that time to the fact that the equipment was actually operating practically continuously three shifts a day?

A. If I had, I would not have agreed to the extension period. It is quite obvious. I was not going to jeopardize the entire—why, the recapture of the crane by a three months' rental for \$9,-

000.00. I was not going to jeopardize a \$30,000.00 piece of equipment.”

(Note: The break in continuity in the testimony was due to an impediment of speech with which Appellant is afflicted.)

The ultimate answer to Appellee's fanciful argument is clearly supplied by the facts.

Appellee can be restored to status quo.

The Appellee bases its argument that it cannot be restored to status quo on an erroneous statement of fact. The original rental agreement covering the large 701 Crane had expired and Appellant was entitled to the return of the crane prior to the execution of the Change Order No. 1 extending the term and before the Change Order became effective. The original rental term expired on November 21, 1943. The Change Order was not executed and placed in the mail directed to Appellee until November 22, 1943 and the evidence does not show that even then had the Change Order been executed by the Appellee or approved by the United States Maritime Commission to make it effective. (R. 38, 71, 145, 208, 209.)

APPELLEE IS ESTOPPED TO OFFER THE TITLE OF THE UNITED STATES MARITIME COMMISSION AS A DEFENSE.

(Appellee's Brief, page 59.) The Appellee has misconstrued the Appellant's contention in this respect. The Appellant not only contends that the Appellee

was never authorized to claim title for the United States Maritime Commission, so far as the record of this case is concerned and from what Appellant knows of the facts, but Appellant also contends that this record does not show that the United States Maritime Commission or the United States of America has authorized the Appellee to defend this action upon the asserted title of the United States or the Commission. The law is clearly established that a bailee can assert a superior title in an action by the bailor only when he defends on such title and the defense must be by the authority of the third person. *Dodge v. Meyer* (1882), 61 Cal. 405, 423; *Palmtag v. Doutrick* (1881), 59 Cal. 154, 168; *Bondy v. American Transfer Co.* (1911), 15 Cal. App. 746, 749.

The quotation from *Corpus Juris Secundum* appearing on Appellee's Brief, page 59, is an accurate quotation, but it is respectfully submitted that that statement of the law is modified by the principle enunciated in the above cases. Appellant does not attempt to deny to Appellee the right to assert that title has passed according to the terms of the contract, but Appellant does insist that Appellee show that the United States of America has authorized the Appellee to interpose the defense. Is that too much? Is that not equitable? So far as the record shows and so far as the Appellant knows the facts to be, the Appellee has neither delivered the cranes to the United States, nor has received the authorization of the United States to interpose the alleged superior title of the United States. As pointed out by the Supreme Court in the case of

The "Idaho" (1876), 93 U. S. 575, 581, to permit the interposition of the asserted title of a third party without delivery to the third party or without the authority of the third party to interpose the defense of superior title would open the door to fraud on the part of the bailee.

Is not the following language from the case of *Blackorby v. Friend, Crosby & Co.*, 158 N.W. 708, 709, 134 Minn. 1, 8 C.J.S. 254, Note 81, stating the reason for the rule peculiarly appropriate under the present circumstances?

"One of the reasons assigned for this rule is that the bailee is given possession of the property by reason of the trust reposed in him by the bailor, and that good faith on his part requires him to restore to the bailor the advantage arising from possession of the property before asserting that the bailor is not entitled to it. To permit him to deny his bailor's title without surrendering possession would enable him to use his position of trust to cast upon the bailor the burden of proving title by a preponderance of the evidence, and perhaps in a foreign jurisdiction, when otherwise such burden would rest upon himself."

Davis v. Donohoe-Kelly Banking Co. (Appellee's Brief, page 59.) This case is not authority for the proposition cited. Appellee misstates the facts and hence draws an erroneous conclusion. The facts are these: A deposited a box with the defendant bailee with instructions to deliver the box to A or B. A was in fact the agent of B. In an action by a creditor of A, who sought to attach

the box, the Court held that the defendant bailee could set up the title of B, the principal, and to whom it had delivered the box, against the creditor.

Appellant is entitled to reformation.

All of Appellee's argument that Appellant is not entitled to rescission or reformation is based upon the proposition that these remedies "lie only where the written instrument fails to express the real transaction, * * * and the mistake must have been made in the drawing of the contract * * *." If we supply the one missing point that Appellee, for very obvious reasons, so insistently avoids, we find that all of Appellee's argument in this respect supports the Appellant's case. This fact is that the extension agreement identified as Change Order No. 1 does not express the mutual understanding of the parties that the void recapture clause should remain inoperative during the extended period. It was agreed between the parties that title to the crane would not be lost by Appellant should the rental period be extended. (R. 130, 288, 294.) Moreover, as stated before, the Change Order itself reaffirms all the terms and conditions of the original rental agreement and the nullity of the recapture clause was as much a term and condition of the original rental agreement as any others contained therein. At the trial the lower Court stated:

"Did the Change Order reaffirm the contract? If it had, I do not think we would be here."

Mr. Johnson (counsel for the Appellee replied):

"In terms it reaffirms the contract." (R. 298.)

CONCLUSION.

Appellant submits that the judgment of the trial Court should be reversed and remanded, with instructions to enter findings of fact and conclusions of law in accordance with the evidence and the law governing the issues involved, thereafter issuing a judgment in conformity therewith.

Dated, San Francisco, California,

May 22, 1947.

Respectfully submitted,

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See v. 24 54
No. 11449

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JUL 18 1947

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11449

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against Flotill Products, Inc. (herein called respondent) on August 19, 1946 (70 N. L. R. B. 118; R. 74-107).² Jurisdiction of this Court is based upon Section 10 (e) of the Act. The unfair

¹ Relevant portions of the Act appear in the Appendix, *infra*, pp. 38-43.

² On November 6, 1946, this Court granted the petition for leave to intervene in this proceeding filed on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. and California State Council of Cannery Unions, A. F. L. (R. 528-529).

labor practices occurred at respondent's plant in Stockton, California,³ within this judicial circuit.

STATEMENT OF THE CASE

A. The facts as found by the Board

This case presents the question of the validity of the Board's finding that respondent under the circumstances presented committed an unfair labor practice by entering into an exclusive-recognition and closed-shop contract with the A. F. L.⁴ on March 5, 1946. Briefly, the relevant and undisputed facts are as follows:

1. Prior contractual relations

In 1940, the A. F. L. entered into a bargaining agreement (herein called the master agreement) with California Processors and Growers, Inc. (herein called C. P. & G.), the dominant trade association in the canning and processing industry for this California area (R. 25-26, 127-130, 268, 311-313). Respondent, although not a member of the C. P. & G., has for several years followed the practice of subscribing to the master agreement (R. 127, 304-306, 312-313); in addition, it has embodied in separate supplemental contracts with the A. F. L. matters not

³ Respondent, a California corporation, operates a plant at Stockton, California, where it is engaged in the canning and processing of fruits and vegetables, most of which are sold in interstate and foreign commerce (R. 124-126). Respondent concedes that it is subject to the Act (R. 125-126); hence no issue is presented as to jurisdiction.

⁴ International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., and California State Council of Cannery Unions, A. F. L., and their predecessor A. F. L. organizations, hereinafter called the A. F. L. (R. 274-282, 290-291, 294-295, 302-304).

covered by the master agreement (*ibid.*). The last master agreement and respondent's separate contract were to expire on March 1, 1946 (R. 58).

2. The representation proceeding

In July 1945, the C. I. O.⁵ filed a petition with the Board alleging that a question affecting commerce had arisen concerning the representation of respondent's employees within the meaning of Section 9 (c) of the Act (R. 297-299, 509-510). Petitions alleging the same question were filed by the C. I. O. for the employees of members of the C. P. & G. and other employees in the area (R. 22-26). During July, August, and September 1945, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers, including respondent, were represented, were held on these petitions in what has come to be known as the *Bercut-Richards* case (R. 22-23, 126; *Matter of Bercut-Richards Packing Co., et al.*, 64 N. L. R. B. 133). At the hearing on the petitions, the A. F. L. contended that its existing agreements constituted a bar to the representation proceedings and urged that the Board dismiss the petitions on the ground that no question concerning representation existed. 64 N. L. R. B. 133, 135.

On October 5, 1945, the Board issued a telegraphic order directing an election in the consolidated cases. It found that the existing contracts did not constitute a bar to the representation proceedings because the contracts were to expire within a short time, and

⁵ Food, Tobacco, Agricultural and Allied Workers Union of America, C. I. O.

the residual period of the contracts was one in which canning operations would be at a low ebb and a relatively small number of employees would be working. 64 N. L. R. B. 133, 135 (R. 22-26, 126).⁶ On October 15, 1945, pursuant to the Board's order, the Regional Director conducted an election among respondent's employees in the unit found to be appropriate (R. 48-49, 126, 325). Of the 205 valid and unchallenged votes counted, 105 were cast for the A. F. L. and 100 for the C. I. O.; in addition, there were 20 challenged ballots (R. 67).

The A. F. L. filed objections to all the elections held pursuant to the *Bercut-Richards* decision, including the election held among respondent's employees (R. 48-49, 472-503). On January 16, 1946, the Regional Director issued his Report on Objections to the election (R. 354-471). On February 15, 1946, after a hearing on the objections, the Board issued a "Supplemental Decision and Order" in the consolidated cases vacating and setting aside all the elections on the ground that their results were inconclusive (R. 48-67). Since, by reason of the seasonal nature of the canning industry, it would be several months before the spring season reached its peak (R. 266-267), the Board stated that new elections would be held as early in the 1946 season as there was substantial employment, or even sooner,

⁶ The Board subsequently, on October 12, 1945, issued a formal Decision, Direction of Elections, and Order consonant with the determinations and findings made in the telegraphic decision. 64 N. L. R. B. 133.

if adequate voting lists could be prepared (R. 59, 126). The Board then declared (R. 58-59):

While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current AFL contract will expire on March 1 and since *the legal effect of the foregoing determination is to keep the question of representation pending before the Board*, none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,¹⁴ *the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved*, although they may recognize each one as a representative of its members. In this state of the record *no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date*;¹⁵ the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in sub-section 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive con-

¹⁴ See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 163; See also *Matter of Ken-Rad Tube & Lamp Corp.*, 62 N. L. R. B. 21.

¹⁵ Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040."

ditions now existing by virtue of the foregoing agreements. [*Italics supplied.*]

Respondent received a copy of the Board's decision prior to March 1, 1946 (R. 251-252, 295). Nevertheless, on March 5, 1946, without any preliminary showing of majority (R. 79), respondent entered into a contract with the A. F. L. which recognized that union as the exclusive representative of all the employees in the appropriate unit and required membership in the A. F. L. by all the employees in the unit as a condition of employment (R. 127-129, 295). Specifically, the contract, of indefinite duration, required that all employees become and remain members of the A. F. L., or be discharged within 36 hours after notice to respondent of their failure to comply, and that, in the hiring of new employees, preference be given unemployed members of the A. F. L. (R. 128-129). Admittedly, respondent has enforced and given effect to this agreement since its consummation (R. 281-283).

B. The Board's decision and order

The Board found, on the facts related above, that respondent, by its grant of exclusive recognition and a closed-shop contract to the A. F. L. at a time when it knew that a representation question was pending and that it was under an obligation to refrain from throwing its economic weight to either side in the unresolved contest between the rival unions (R. 75-80) had thereby, in violation of Section 8 (1) of the Act, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the closed-shop contract, to withhold exclusive recognition from the A. F. L. unless and until the A. F. L. shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80-83).⁷

SUMMARY OF ARGUMENT

I. The Board validly found that, by granting exclusive recognition and a closed-shop contract to the A. F. L. with knowledge that a representation proceeding was then pending and unresolved, respondent interfered with the freedom of choice guaranteed its employees by Section 7 of the Act.

II. The Board's order is valid.

PRELIMINARY STATEMENT

The Board found that, by conferring exclusive recognition and a closed-shop on the A. F. L. at a time when the A. F. L.'s majority status was in question, respondent granted powerful support to the A. F. L. and thereby violated its duty to remain

⁷ The Board dismissed that portion of the complaint which alleged that respondent's conduct also constituted an independent violation of Section 8 (3) of the Act (R. 80, 83). In addition, the Board adopted the Trial Examiner's conclusion that the following allegations of the complaint be dismissed for want of substantial supporting evidence: That respondent urged, persuaded and warned its employees not to become members of the C. I. O.; demanded that they become and remain members of the A. F. L., and threatened them with discharge if they failed to do so; and granted access to its plant to representatives of the A. F. L., while refusing the same privilege to representatives of the C. I. O. (R. 74-75, 92-95).

neutral in the unresolved contest for representation between the two rival unions.

This case presents no novel questions. It is, as the Board pointed out (R. 75-77) and we shall later show, consonant with well-established doctrine long ago enunciated by the Board and uniformly approved by the courts.

ARGUMENT

POINT I

Execution of the contract of March 5, 1946, interfered with the employees' freedom of choice, in violation of Section 8 (1) of the Act

A. The Act required respondent to remain neutral in the election contest

1. The basic doctrine of neutrality

The Act is designed to reduce industrial strife by encouraging the making of collective bargaining agreements with unions freely chosen by a majority of the workers. Section 1. Congress sought to achieve this objective by guaranteeing to employees the fundamental right "to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer." *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; Section 7 of the Act.

It is thus accepted datum that the basic employee right of free choice, to be meaningful, must necessarily be safeguarded by a correlative duty on the part of the employer to refrain from intruding upon that freedom by the use of its economic power as an employer to assist or encourage, or to oppose or

discourage, adherence to any particular labor organization. So undeviating is this requirement of employer nonintervention that the Supreme Court early acknowledged that even "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78.

These are the fundamental, self-evident concepts of the statutes. They have been uniformly recognized and approved by the Board and the courts.

2. *Importance of neutrality in the face of an election*

The doctrine of employer neutrality assumes critical significance in the face of a pending Board election, undertaken pursuant to Section 9 (c) of the Act for the purpose of ascertaining the true preference of the employees for a bargaining representative. At such a time, to insure attainment of the statutory objective of genuine self-determination, the employer must, as the Board and the courts have so often declared, remain scrupulously aloof.

Where only one union is a candidate for the employees' favor, the contest is "rightfully one between employees," and the employer may not become a "participant in a contest to which it is not a party." *Reliance Mfg. Co. v. N. L. R. B.*, 143 F. 2d 761, 763 (C. C. A. 7) (on contempt). See also: *N. L. R. B. v. Bradley Lumber Co.*, 128 F. 2d 768, 70 (C. C. A. 8; *N. L. R. B. v. Oregon Worsted Co.*, 96 F. 2d 193, 195 (C. C. A.

9); *N. L. R. B. v. Franks Bros.*, 137 F. 2d 989, 991-992 (C. C. A. 1), affirmed 321 U. S. 702; *F. W. Woolworth Co. v. N. L. R. B.*, 121 F. 2d 658, 661 (C. C. A. 2); *N. L. R. B. v. Taylor-Colquitt*, 140 F. 2d 92, 94 (C. C. A. 4); *N. L. R. B. v. Times-Picayune Publishing Co.*, 130 F. 2d 257, 258 (C. C. A. 5); *New York Handkerchief Mfg. Co. v. N. L. R. B.*, 114 F. 2d 144, 147 (C. C. A. 7), certiorari denied, 311 U. S. 704; *Locomotive Finished Material v. N. L. R. B.*, 142 F. 2d 802, 803 (C. C. A. 10); *Peter J. Schweitzer, Inc. v. N. L. R. B.*, 144 F. 2d 520, 524-525 (App. D. C.).

So also, where the choice is to be made among several competing unions, the employer may not enter the race by according such treatment to one of the rivals as will give it either an advantage or disadvantage over the other candidates in the campaign for the employees' favor. "A fair election requires that equal opportunities be given to both [candidates]". *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 226. See also: *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. 2d 780, 788 (C. C. A. 9); *Big Lake Oil Co. v. N. L. R. B.*, 146 F. 2d 967, 970 (C. C. A. 5); *Valley Mould & Iron Corp. v. N. L. R. B.*, 116 F. 2d 760, 764 (C. C. A. 7), certiorari denied, 313 U. S. 590; *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 860 (C. C. A. 7); *N. L. R. B. v. Stone*, 125 F. 2d 752, 756 (C. C. A. 7), certiorari denied, 63 S. Ct. 44; *N. L. R. B. v. Jahn & Ollier Engraving Co.*, 123 F. 2d 589, 592-593 (C. C. A. 7).

These are the basic principles which govern the legality of employer conduct at a time when employees are confronted with the choice of a bargaining

representative. And these are the principles which the Board held to be controlling in its determination that respondent unlawfully interfered with the freedom of choice of its employees by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when the question of its representative status was pending and unresolved.

B. Respondent failed to observe the requisite neutrality when it entered into the contract of March 5, 1946, with the A. F. L.

When, on February 15, 1946, the Board set aside all the elections, including that held among respondent's employees, on the ground that their results were inconclusive, it specifically stated that it would hold other elections as soon as practicable and that the legal effect of its determination was "to keep the question of representation pending before the Board * * *" 65 N. L. R. B. 1052, 1057. Moreover, the Board called the attention of all the employers involved, including respondent, to the general principle that they could not, "pending a new election, give preferential treatment of any kind to any of the labor organizations involved" by renewing their existing agreement with the A. F. L., or by entering into a new, exclusive agreement with it or the C. I. O., but that they might, if they so desired, "recognize each one as the representative of its members" (*id.*).

By March 1, 1946, respondent had received a copy of the Board's decision. Nevertheless, on March 5, it entered into a contract with the A. F. L., one of the candidates in the unscheduled election, granting it not only exclusive recognition but also a closed shop for an indefinite period (*supra*, p. 6).

The Board found that, by recognizing the A. F. L. as exclusive representative at a time when its representative status was in doubt and its contest with the C. I. O. for certification as bargaining agent was unresolved, respondent granted "potent assistance" to the A. F. L. "in derogation of the right of the employees" to vote without restraint in the forthcoming election (R. 79). It found further that, by conferring upon the A. F. L. the additional advantage of a closed shop, respondent rendered "well-nigh impossible" full freedom of later choice by the employees (*ibid.*). It accordingly concluded that the execution of the contract violated Section 8 (1) of the Act. As we now show, this finding is supported by the well-established principle that an employer must maintain an attitude of neutrality in a contest between unions.

1. *Exclusive recognition may be conferred only on a union whose majority status is free from doubt*

The status of exclusive bargaining representative affords a union the unique prestige of speaking to the employer in behalf of all the employees in the unit. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332; *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 202. Enjoyment of exclusive power to represent the interests of the employees in dealing with their employer on all problems arising out of the employment relationship necessarily places the representative in a superior position to that of all other organizations seeking the employees' favor. In making a choice as to which of two or more competing

unions to join, an employee will naturally prefer an organization with which his employer has already demonstrated a willingness to deal, rather than one whose acceptability to the employer is still speculative. And, just as naturally, an employee will be drawn to an organization which already speaks for him in its role as exclusive representative and which he therefore feels will represent his interests more effectively if he joins its rolls and contributes his financial support. The Supreme Court early recognized the value to a labor organization of exclusive bargaining status when it observed that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees". *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267. See also: *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 598.

The Act, therefore, meticulously enunciates the doctrine of majority rule and provides that the marked advantage of exclusive recognition is properly available only to a labor organization representing a real majority of the employees. Section 8 (5). Where true majority status is in doubt, the grant of exclusive recognition, as the Board and the Courts have consistently held, at once constitutes a departure from required neutrality, unlawful assistance to the union, and illegal interference with the employees' freedom of choice. *International Ass'n of Machinists v. N. L. R. B.*, 311 U. S. 72, 78-79, 81; *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 659-660 (C. C. A. 9); *N. L. R. B. v. John Engelhorn & Sons*,

134 F. 2d 553, 556 (C. C. A. 3); *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. C. A. 5); *Elastic Stop Nut Corp. v. N. L. R. B.*, 142 F. 2d 371, 380 (C. C. A. 8), certiorari denied, 323 U. S. 722. Indeed, the bestowal of exclusive representation status on one of several competing unions has been considered to be such powerful support as to mark the favorite as a company-dominated organization, which must be disestablished in order to restore the employees' freedom of choice. See, e. g., *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9).

2. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of exclusive recognition constituted unlawful assistance*

The timely filing of a petition for investigation of representatives under Section 9(c) of the Act presumptively places in doubt the representative status of any existing exclusive agent and normally requires the Board, upon a reasonable showing of substantial employee preference for a competing union, to resolve the doubt and designate the true representative. Once the Board entertains the petition, and until the question of which of the rival claimants actually represents a majority of the employees is finally settled by established Board procedures, the obligation of neutrality compels the employer to refrain from conferring exclusive recognition upon any of the contestants, or from according it treatment which is tantamount to such recognition. It can readily be seen that otherwise there cannot be a free and un-

trammelled choice in the subsequent Board election. The Board and the Courts have so held. See, e. g., *Matter of Acme Brewing Co.*, 74 N. L. R. B. No. 31; *Matter of LaSalle Steel Co.*, 72 N. L. R. B. 41; *Matter of Armour & Co.*, 72 N. L. R. B. No. 208; *Matter of Roots-Connersville Blower Corp.*, 64 N. L. R. B., 855, 859-860; *Matter of Owens-Illinois Glass Co.*, 60 N. L. R. B. 1015, 1017-1019; *Matter of Minnesota Mining & Mfg. Co.*, 61 N. L. R. B. 697, 699-701; *Matter of Waterman S. S. Co.*, 7 N. L. R. B. 237, 241-242.⁸ In conformity with this doctrine, the Board

⁸ Before the Board, respondent and the A. F. L. pointed to the Board's decisions in *Matter of American-West African Lines, Inc.*, 21 N. L. R. B. 691; *Matter of General Electric X-Ray Corp.*, 67 N. L. R. B. 997; and *Matter of Con P. Curran Printing Co.*, 67 N. L. R. B. 1419, in support of their argument that, before its decision in the instant case, the Board had not found the execution of a contract under the circumstances of this case to constitute interference with the free expression of employee choice. The cases referred to above in the text negative the contention that the doctrine was first enunciated in the instant case. Moreover, none of the three cases relied upon by respondent and the A. F. L. represents a departure from or a variance with this doctrine.

In the *American-West African* case, the Board specifically found that the employer entered into an exclusive dealing contract with one union at a time when, unlike the facts of the instant case, it had been furnished satisfactory proof of the contracting union's majority and it had no knowledge of the filing of a petition with the Board by a rival union. In the *General Electric X-Ray* case, the Board merely enunciated the rule that a bare claim of majority by a rival union, not followed within ten days by the filing of a petition with the Board, is insufficient to cast doubt upon the proven majority status of another union with whom the employer thereafter enters into an agreement. In the instant case, the doubt as to the A. F. L.'s majority status had been raised by the C. I. O.'s petition long before the contract in question was executed and was brought to the attention of respondent in the Board's decision of

has consistently held that, once representation proceedings have been set in motion, an employer and a union cannot, by entering into an exclusive dealing contract, prevent the Board from holding an election to resolve the question concerning representation. See, e. g., *Matter of St. Genevieve Lime & Quarry Co.*, 70 N. L. R. B. 1259; *Matter of Vermont Marble Co.*, 42 N. L. R. B. 185, 187; *Matter of Wolfsheim & Sachs*, 42 N. L. R. B. 232, 234; *Matter of American-West African Lines, Inc.*, 42 N. L. R. B. 1086, 1089.

One of the first cases in which the Board found that conduct tantamount to exclusive recognition of one of the candidates in the face of a pending election constituted unlawful interference with the employees' freedom of self-determination was *Matter of Waterman Steamship Corp.*, 7 N. L. R. B. 237, 241-242. There, after directing that an election be held among the shipowner's employees to determine whether they desired to be represented for collective bargaining by the A. F. L. or the C. I. O., the Board cautioned the employer not to interfere with the employees' free choice by permitting only one of the candidates access to its vessels for the purpose of talking with the employees aboard. *Matter of American France Line et al.*, 3 N. L. R. B. 64, 74, 76. The shipowner, however, in disregard of the Board's admonition, thereafter permitted only the A. F. L. representatives

February 15, 1946, three weeks before the contract was entered into. Similarly, the decision in the *Con P. Curran* case is here inapplicable. There, the Board merely followed the established doctrine, not applicable to the facts of this case, that a certification is valid for at least one year as against any rival claim made during that year.

to board the vessels and denied the same privilege to the C. I. O. on the ground that it was bound under its contract with the A. F. L. to grant that permission. In a subsequent complaint case, initiated by the C. I. O., the Board found that this disparate treatment of the two organizations, at a time when the question concerning the representation of the employees was pending and unresolved, "is obviously a discrimination in favor of the I. S. U. [A. F. L.] as against the N. M. U. [C. I. O.], which has the necessary effect of impeding its [the employer's] employees in the free choice of representatives". 7 N. L. R. B. 237, 241. The Board accordingly found that the employer's conduct violated Section 8(1) of the Act. The Supreme Court sustained the Board's finding with the observation that "if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. of L." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226.

The *Waterman* case thus plainly holds that the award of exclusive privileges to one of several unions competing for the employees' votes in a forthcoming election violates the employer's duty to refrain from discriminatory treatment of rivals for employee support and impedes the free exercise of employee choice. Permitting only one union to have access to the employees in the course of a pre-election campaign is no different in the prestige it bestows on the favored union and the resultant effect upon the employees

from granting to a competing union the exclusive right to have audience with the employer on behalf of all the employees in the unit. Indeed, the Board, recognizing that these related types of preferred treatment would seriously hamper its efforts to hold a free election, cautioned the employers in both the *Waterman* case and the instant case to refrain from according such preference to either candidate. And, in both cases, it found that the disparate treatment of the contesting unions constituted a violation of Section 8 (1) of the Act.

The Board's finding, that the actual grant of formal exclusive recognition to one of several competing unions pending the resolution of a question concerning representation constitutes unlawful assistance, has been upheld in the two cases involving this principle which have thus far come before the courts. *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 556 (C. C. A. 3); *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. C. A. 5). In both these cases, the Circuit Courts sustained the Board's finding on the general well-established principle, enunciated in the *Waterman* case, that the bestowal of an exclusive privilege on one union in the face of conflicting representation claims of other unions constitutes assistance to the contracting union. In the *Southern Wood Preserving* case, after holding that the execution of an exclusive recognition agreement under these circumstances violated the neutrality requirements of the Act by according support to the contracting union,

the Court observed that "Financial support is not the only kind of support forbidden".⁹

It is thus apparent that, when respondent entered into an exclusive dealing agreement with the A. F. L.

⁹ Before the Board, respondent and the A. F. L. attempted to show that the courts, in two cases, had refused to sustain the doctrine enunciated by the Board in the instant case. But again, the reliance on these two cases is misplaced. In *N. L. R. B. v. Pacific Greyhound Lines, Inc.*, 106 F. 2d 867 (C. C. A. 9), the sole question before this Court was whether the modification of a closed-shop agreement in the face of a scheduled election constituted sufficient basis for adjudging the employer in contempt of an earlier decree issued by this Court against the employer. 91 F. 2d 458. The Board's petition for a rule to show cause why the employer should not be so adjudged was dismissed by this Court on the narrow ground of failure to state facts within the scope of the outstanding decree. This Court held that, since the new acts complained of were not of the same character as those prohibited in its decree, the controversy was one which should be determined by the Board, rather than the Court. The question of whether the continued recognition of one of the unions constituted a violation of the Act was, therefore, never decided by this Court.

Nor is *N. L. R. B. v. McGough Bakeries*, 153 F. 2d 420 (C. C. A. 5), in point. There, the question before the Court was not whether the employer committed an unfair labor practice by granting exclusive recognition and a closed-shop contract to a union at a time when a question concerning representation was pending. Although a petition had been filed by the contracting union before the execution of the contract, the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into. The sole issue before the Court was whether the employer had, by various forms of assistance other than the closed-shop contract, rendered the union company-dominated and whether, therefore, the closed-shop contract was invalid under the proviso to Section 8 (3) of the Act because made with an assisted union. The sole issue on review was thus whether

in the face of an unresolved dispute as to representation and with the knowledge that an election would be scheduled to settle that dispute, it unlawfully threw its economic weight in support of the A. F. L. in the forthcoming election and gave it a favored position which interfered with the free choice of its employees.

3. *The A. F. L.'s majority status was not free from doubt; hence, the grant to it of a closed shop constituted unlawful assistance*

But respondent did more than to confer upon the A. F. L. exclusive bargaining status. It armed the A. F. L. with a closed shop—the most powerful weapon for obtaining votes in the anticipated election. The contract, of indefinite duration, compelled all employees, as a condition of further employment, to become and remain members of the A. F. L. (*supra*, p. 6). It further provided that, in the hiring of new employees, preference would be given to unemployed members of the A. F. L. (*ibid.*). The A. F. L. could thus in practice pick and choose the electorate in the forthcoming election by preventing the employment of its opponents, by compelling

the employer had earlier granted such support to the contracting union as to render it company-dominated and take the closed-shop contract outside the protection of Section 8 (3) of the Act. The Court held that there was insufficient evidence to support the Board's finding of violation of Section 8 (2) and that, consequently, the contract with the union, which had a majority and which majority the Court found was uncoerced, was lawful under the proviso to Section 8 (3) of the Act and that the discharges made pursuant thereto were also proper. This case, like the *Pacific Greyhound* case, simply did not involve an adjudication of the validity of the doctrine of the instant case.

all employees to join its ranks, and by holding "in terrorem of discharge" those employees who supported its rival in the pre-election campaign. *Local 2880 v. N. L. R. B.*, 158 F. 2d 365, 368 (C. C. A. 9), certiorari granted May 6, 1947, 15 U. S. Law Week 3423.

As this Court has already held in the *Local 2880* case, enforcement of an existing closed-shop contract during a pre-election campaign constitutes unlawful interference with the employees' freedom of choice. See also: *N. L. R. B. v. American White Cross Laboratories*, 160 F. 2d 75 (C. C. A. 2). How much more corrosive of that freedom is the imposition upon the employees of a *new* closed-shop contract during such a critical period.¹⁰ For this reason, the Board has consistently condemned closed-shop contracts entered into or extended during the pendency of a question concerning representation. *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 1060, 1068-1071; *Matter of Phelps Dodge Copper Products Corp.*, 63 N. L. R. B. 686; *Matter of Abraham B. Karron*, 41 N. L. R. B. 1454, 1463-1464; see also: *Matter of Ken-Rad Tube and Lamp Corp.*, 62 N. L. R. B. 21; *Matter*

¹⁰ The Board did not consider it necessary to find that the closed-shop contract also violated Section 8 (3) of the Act, which permits the making of a closed-shop contract only with a union which actually represents a majority of the employees. It should, nevertheless, be pointed out that the courts have consistently noted that the making of such a contract with a union which does not have a true majority following constitutes powerful assistance even in the absence of an impending election. See, e. g., *N. L. R. B. v. Electric Vacuum Cleaner Corp.*, 315 U. S. 685, 695; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 F. 2d 237, 242-243 (C. C. A. 9); *N. L. R. B. v. Graham Ship Repair Co.*, 159 F. 2d 787 (C. C. A. 9).

of *Southern Wood Preserving Co.*, 45 N. L. R. B. 230, 237-238, enforced 135 F. 2d 606 (C. C. A. 5); *Matter of Dominic Meaglia & Samuel Meaglia*, 43 N. L. R. B. 1277, 1301; *Matter of Fiss Corp.*, 43 N. L. R. B. 125, 136, enforced 136 F. 2d 991 (C. C. A. 3); *Matter of Premo Pharmaceutical Laboratories*, 42 N. L. R. B. 1086, 1097, enforced 136 F. 2d 85 (C. C. A. 2); *Matter of John Engelhorn & Sons*, 42 N. L. R. B., 886, 878, enforced 134 F. 2d 533 (C. C. A. 3); *Matter of Ward Baking Co.*, 8 N. L. R. B. 558, 565-566. It should be noted that in none of these cases could the parties have been so clearly aware of the existing doubt concerning the majority status of the contracting union as they were in the instant case. Here, the Board, in its decision of February 15, 1946, specifically and officially noted that the question of which of the competing unions represented a majority of the employees was still unresolved and was still before the Board (*supra*, pp. 5-6.)

It plainly follows, as the Board found (R. 98, 74-75), that "by entering into the closed-shop contract with the A. F. L. on March 5, 1946, with knowledge of the pending proceedings for the determination of representatives, the respondent indicated its approval of the A. F. L., accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the C. I. O. and thereby rendered unlawful assistance to the A. F. L., which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor

practices within the meaning of Section 8 (1) of the Act.”

C. Respondent is without a valid defense

1. *Inconclusive election results do not operate to restore majority status*

Before the Board, respondent and the A. F. L. sought to justify the execution of the March 5 contract by the following chain of argument: Until the representation petition was filed, the A. F. L. was the majority representative of the employees. Its majority status must, therefore, be presumed to have continued unless and until a new bargaining agent was certified. Since the first election did not result in the certification of another representative, the A. F. L. retained its status as majority representative. Consequently, when the old contract expired, respondent was obligated by Section 8 (5) of the Act to recognize and deal with the A. F. L. as exclusive representative of the employees and to enter into a contract with it.

This argument is as unsound as it is ingenious. Respondent and the A. F. L. relied on a series of cases which are here plainly inapposite. The first line of cases stands for the proposition that it is an unfair labor practice for an employer to refuse to bargain with a union which has lost its majority status by reason of the employer's earlier unlawful rejection of the union or because of other unfair labor practices. *N. L. R. B. v. Federbush*, 121 F. 2d 954, 956 (C. C. A. 2); *N. L. R. B. v. Piqua Munising Wood Products Co.*, 109 F. 2d 552, 554-555 (C. C. A. 6); *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d

652, 660 (C. C. A. 9); *Franks Bros. v. N. L. R. B.*, 321 U. S. 702. The doctrine of these cases is that, but for the employer's original wrongful refusal to bargain with the union when it did represent a majority of the employees, or his other unfair labor practices, the union would have maintained its majority following. The Board, therefore, has required the employers in cases of this type to dissipate the effects of their unfair labor practices by bargaining with the union even though it no longer commanded a majority as of the date of the Board's order. The Supreme Court, in *Franks Bros. v. N. L. R. B.*, 321 U. S. 702, 705, cited by respondent and the A. F. L., sustained as valid the Board's bargaining order in such situations on the ground that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

The rule of these cases is simply not applicable to the facts of the instant case. Respondent did bargain with the A. F. L. for many years prior to the filing of the petition for investigation and certification of representatives, thereby according the bargaining relationship that "chance to succeed" which the *Franks Bros.* holding requires. At no time, moreover, did respondent refuse to recognize or deal with the A. F. L., or assert that it had lost its majority status. The question of whether the A. F. L. still commanded the requisite majority was raised by the C. I. O. through the appropriate statutory procedure, and not by respondent as an excuse for any refusal to bargain. The presumption of continued majority

status which the *Franks Bros.* decision recognizes is, therefore, not operative on the facts of the case at bar.

The second group of decisions with which respondent and the A. F. L. sought to support their argument similarly are not controlling on the facts of the instant case. This second line of cases supports the doctrine, established by the Board in another context, that a certification must be honored by an employer for a reasonable period, during which time the majority status of the certified union is presumed to continue and is not subject to attack. *N. L. R. B. v. Appalachian Electric Power Co.*, 140 F. 2d 217, 220-222 (C. C. A. 4); *N. L. R. B. v. Botany Worsted Mills*, 133 F. 2d 876, 881-882 (C. C. A. 3); *N. L. R. B. v. Whittier Mills Co.*, 111 F. 2d 474, 477-478 (C. C. A. 5); *Matter of Anderson Mfg. Co.*, 58 N. L. R. B. 1511, 1512-1513. It is certainly not to this context here presented that that doctrine is applicable. That doctrine stands for the proposition that *after* the doubt as to representation has been resolved by means of a validly conducted election, upon the basis of which the Board has issued a certification, the certified union must be accorded exclusive recognition for a reasonable period. This is on the theory that there must be "some measure of permanence in the results" of a validly conducted election. *N. L. R. B. v. Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C. C. A. 2), certiorari denied, 323 U. S. 714, and that "freedom to choose a representative does not imply freedom to turn him out of office within the next breath" (*ibid*). The same line of cases holds that the length of time "the employees' undoubted power to recall an election

representative may be suspended, is a matter primarily, perhaps finally, for the Board'' *Century Oxford* case, *supra*, at p. 543; *Appalachian Electric Power* case, *supra*. Here the Board acted upon the fact that the A. F. L. had already enjoyed such exclusive status for a reasonable period, and the Board, by entertaining the petition for investigation and certification of representatives, determined that there was in fact a reasonable doubt as to the A. F. L.'s representative status. This doubt was made further evident by the election returns, which showed that a majority of the employees did not favor either union.

There is, therefore, no basis for the contention that an inconclusive election, particularly when it is to be followed by another vote, restores the bargaining relationship which existed before the representation proceeding was instituted. On the contrary, once a representation proceeding is set in motion, it raises and keeps alive the issue of majority representation until a conclusive election has been held and the Board has issued its findings on the final desires of the employees. *Inland Empire District Council v. Millis, et al.*, 325 U. S. 697, 707; *N. L. R. B. v. Int'l Brotherhood of Electrical Workers*, 308 U. S. 413, 414-415. In the instant case, the Board made this point clear beyond doubt when it stated in its decision of February 15, 1946, that it retained jurisdiction of the question concerning representation and that another election would be held as soon as practicable (R. 58-59).

Indeed, by recognizing the A. F. L. in the face of a pending representation proceeding before the

Board, respondent, far from complying with its obligation under the Act, arrogated to itself the function of determining the question of majority status, "which Congress entrusted to the Board alone." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226. Respondent, therefore, unlawfully interfered not only with the right of its employees but also with the Board's orderly processes for affording a true exercise of that right. *N. L. R. B. v. Bird Machine Co.*, decided May 20, 1947 (C. C. A. 1), 20 L. R. R. M. 2200, 2202. The vice of respondent's conduct becomes even more apparent when it is noted that respondent did not even require proof of majority from the A. F. L. before entering into the contract of March 5 and that such following as the A. F. L. had at that time could not possibly have been truly representative, for the season was then at its lowest ebb and respondent had in its employ only 70 persons, as compared with the approximately 1,200 people it employed at the height of the season (R. 266, 316).

2. *The doctrine of this case is not inconsistent with the policy of stability of bargaining relationships*

Respondent and the A. F. L. made the further related argument before the Board that the doctrine enunciated in this case is at odds with the policy of the Act, which encourages the making of collective bargaining agreements and the maintenance of stable bargaining relationships. The Board's holding in this case, they say, would deprive the employees of the right to bargain collectively during the entire interval in which the representation proceeding is

awaiting final disposition, thereby preventing effectuation of the collective bargaining policy of the Act. The short answer to this argument is that it begs the question. The right guaranteed to employees is that of bargaining collectively through "representatives of *their own* choosing." The Act does not foster or promote bargaining with a union whose majority status is in doubt. On the contrary, it recognizes that the grant of exclusive dealing rights to a non-representative agent is a prolific source of labor strife, which the unfair labor practice provisions of the Act, protecting freedom of choice, were designed to eliminate. Sections 1, 7, and 8. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45.¹¹ And Congress, when it invested the Board with exclusive power under Section 9 of the Act to resolve conflicts as to representation, was obviously mindful of the fact that it takes time for the Board to determine the question of representation and that

¹¹ *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, does not, contrary to the contention of respondent and the A. F. of L. before the Board, hold otherwise. There, the Supreme Court specifically stated that the pendency of a question concerning representation does not preclude the making of a contract with one of the competing unions *for its members only*, and not for exclusive recognition as agent for all the employees. 305 U. S. at pp. 237-238. Such a limited contract, the Supreme Court held, would not conflict with the declared policies of the Act and would not promote industrial strife. The Board, acknowledging that a contract *for members only* is permissible in the face of a pending representation proceeding, announced to the parties in its decision of February 15, 1946, that they could enter into such a limited agreement. But respondent went beyond the bounds of what was allowable by entering into not only an *exclusive recognition* agreement but also an arrangement for a closed shop.

such delay in the institution of bargaining procedures as is necessarily incidental to the prosecution of a representation proceeding is inevitable in the effectuation of the declared policy of the Act. If the contention here urged by respondent and the A. F. L. were to prevail, the aim of the Act, to vouchsafe employees the right to bargain collectively through representatives *of their own choice*, could never be realized.

Nor does it avail respondent and the A. F. L. to characterize the Board's conduct in this case as inconsistent in that the Board allegedly both honored and disregarded the declared statutory policy at two different stages in these proceedings. Before the Board, they argued that, in the original Decision and Direction of Elections, the Board acknowledged the need for permitting the old contract then in existence to operate through the end of its term, when it stated that "any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose of designating a bargaining representative to negotiate a new agreement to become effective upon the expiration of the existing contract." *Matter of Bercut-Richards et al.*, 64 N. L. R. B. 133, 135. By thus permitting the old contract to continue in effect pending the holding of the elections and the certification of bargaining representatives, they contend, the Board acknowledged that an exclusive recognition agreement would not interfere with the employees' freedom of choice. Yet, subsequently, in the instant case, their argument continues, the Board found that the execution of a new agreement almost immedi-

ately upon the expiration of the old *did* tend to hamper the free expression of the employees' desires.

Here again the answer is plain. In the first place, the Board, in its Supplemental Decision and Order of February 15, 1946, clarified the language quoted above by stating that any closed-shop features of the old contract could not be enforced as against those who supported the rival union in the election. *Matter of Bercut-Richards et al.* 65 N. L. R. B. 1052, 1958, n. 15. This is in conformity with this Court's decision in the *Local 2880* case. Secondly, the Board noted (R. 58-59) that the old contract would come to a close in a relatively short time, during which few persons would be employed by reason of the supervening slack season. Thus, the enjoyment of exclusive bargaining status under the old contract would have had little practical meaning in terms of the exertion of influence on the employees' choice. Moreover, and most importantly, the old contract was lawfully made and did not constitute assistance to the union. All employee voters were aware of its existence and knew that the election was for the purpose of selecting a bargaining representative to succeed the contracting union upon the expiration of the contract. They could, therefore, go into the election with a free choice of alternatives, knowing that their employer was not favoring the A. F. L. by merely permitting the contract to run out its term. The execution of a new contract, however, upon the expiration of the old, was bound, the Board could reasonably find, to have a different effect. Now it meant that the employer had gone beyond the requirements of the old agreement and was, of his

own accord, favoring one union over another. This lesson must have been made particularly clear by the closed-shop provision of the new contract, compelling all employees upon penalty of loss of employment to join the contracting union.

3. *Events subsequent to the date of the order and matters not raised before the Board may not be considered on review; the events relied upon are in any case immaterial*

Respondent has filed in this Court an answer and an accompanying affidavit in which its counsel now avers for the first time: (1) that the A. F. L. won an election held at respondent's plant subsequent to the date of the Board's order; (2) that the A. F. L. now threatens a strike as well as other economic reprisals if respondent should comply with the Board's order; and (3) that, if this Court should enforce the Board's order, the A. F. L. will bring about a complete shutdown of respondent's Stockton plant (R. 529-533). To support the first allegation, respondent, on February 3, 1947, filed a motion for leave to adduce as additional evidence the Board's supplemental decisions in *Matter of Bercut-Richards Packing Co., et al*, and the results of a Board election conducted at respondent's Stockton plant on August 31, 1946, after the date of the Board's order in this case. Respondent did not, however, seek to adduce any evidence as to the second and third points of its answer and accompanying affidavit. This Court granted the motion for leave to adduce but reserved judgment as to the materiality of the evidence until its consideration of the case on its merits.

We submit, first, that evidence of this character has no valid place in the record on which this case is to be decided. Evidence as to how respondent's employees voted in an election held subsequent to the Board's order does not bring before the Court the kind of matter which Section 10 (e) of the Act contemplates. It is well settled that, in a proceeding to review or enforce a final Board order, the validity of the Board's findings and order is determined on the record before the Board at the time the order was made. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *N. L. R. B. v. Newport News Shipbuilding and Drydock Co.*, 308 U. S. 241, 249-50, and cases cited, *infra*, pp. 34-35. Therefore, evidence only as to events which predated the Board's order may be considered "additional" under Section 10 (e). The Board's order is based upon its finding that respondent committed an unfair labor practice on March 5, 1946, by entering into an exclusive recognition and closed-shop contract with the A. F. L. at a time when that union's majority status was put in doubt by the pending representation proceeding. The validity of this finding and the propriety of the Board's order based thereon must be judged by the record made at the time of the order. Events which occurred after the date of the order can in no way excuse or justify such conduct in retrospect. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, *supra*; *N. L. R. B. v. American Creosoting Co.*, 139 F 2d 193, 196 (C. C. A. 6), certiorari denied, 321 U. S. 797; *Wilson & Co. v. N. L. R. B.*, 156 F 2d 577, 579 (C. C. A. 10), certiorari denied, December 9, 1946, 19 L. R. R. M. 87. It is, therefore, immaterial to the

issues on review how respondent's employees voted in an election held after execution of the contract and subsequent to the Board's order.

If the Board's finding that respondent committed an unfair labor practice on March 5, 1946, by entering into the exclusive-recognition and closed-shop contract, is valid, the Board's order is entitled to enforcement regardless of subsequent events. Section 10 (e) of the Act makes enforcement mandatory. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, *supra*. Moreover, whatever the final outcome of the second election, the Board's order is necessary to effectuate the policies of the Act by preventing respondent from engaging in similar conduct at future times when its employees may again be called upon to vote in other Board-conducted elections and by providing assurance that the Board's orderly election processes will not again be thwarted. *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 437-438; *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 226

Nor do the results of the election ^{11a} operate retrospectively to make legal conduct which was illegal at the time of its commission. The operative fact is the interference by respondent with the employees' choice by unneutral conduct at a time when two rival unions were competing for support *in an as yet uncondacted election*. The tally made *after the election* does not alter the fact that support was rendered to one of two competing unions in a

^{11a} Quite apart from the fact that objections to this last election based upon new alleged acts of interference are now under investigation by the Board.

forthcoming election. To contend, as do respondents and the A. F. L., that the election held after the making of the contract retroactively reflects the desires of the employees as of the time the contract was made, is to assume an identity of conditions at both times. This assumption completely ignores the interjection of the contract itself as a powerful factor conditioning the employees' choice.

Respondent, apparently, is relying on the affidavit annexed to its answer for evidence to support the second and third points there raised, *i. e.*, that the A. F. L. now threatens a strike if respondent complies with the Board's order, and that the A. F. L. will bring about a complete shut-down of its plant if this Court should enforce the Board's order. This method of attempting to introduce new evidence in the case is not only procedurally defective, but the new matter itself is wanting in substance. That respondent may not resort to this device to enlarge the record is well established. As this Court had occasion to state, "Such practice is not in harmony with orderly procedure." *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 784 (C. C. A. 9). In *N. L. R. B. v. Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, the Supreme Court declared (at pp. 249-250):

The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in Section 10 (e) of the Act.

Since respondent did not move the Board or this Court for leave, under Section 10 (e) of the Act, to introduce such additional evidence, the new matter may not now be considered.

Accord: *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, ²²⁶~~278~~; *N. L. R. B. v. Biles-Coleman Lumber Co.*, 96 F. 2d 197, 198 (C. C. A. 9); *N. L. R. B. v. Oregon Worsted Co.*, 96 F. 2d 193, 194 (C. C. A. 9); *N. L. R. B. v. Blanton Co.*, 121 F. 2d 564, 571-572 (C. C. A. 8); *Bussman Mfg. Co. v. N. L. R. B.*, 111 F. 2d 783, 788 (C. C. A. 8); *Wilson & Co. v. N. L. R. B.*, 156 F. 2d 577, 579 (C. C. A. 10), certiorari denied on December 9, 1946, 19 L. R. R. M. 87; *Southport Petroleum Co. v. N. L. R. B.*, 315 U. S. 100, 104-105.

Apart from the procedural deficiency mentioned, the claimed threat of economic reprisals by the A. F. L. is no defense for the three-fold reasons, first, that it was never urged before the Board as a defense to the making of the contract (*N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385); secondly, to build a defense upon it is to exalt, as a criterion of permitted conduct, the private convenience of the employer above the policies and plain command of the statute (*N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470);¹² and thirdly, it is

¹² Accord: *Warehousemen's Union v. N. L. R. B.*, 121 F. 2d 84, 87 (App. D. C.), certiorari denied, 314 U. S. 674; *N. L. R. B. v. Isthmian Steamship Co.*, 126 F. 2d 895, 900 (C. C. A. 2); *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 557-558 (C. C. A. 3); *South Atlantic Steamship Co. v. N. L. R. B.*, 116 F. 2d 480, 481 (C. C. A. 5), certiorari denied, 313 U. S. 582; *N. L. R. B. v. Hudson Motor Car Co.*, 128 F. 2d 528, 532, 533 (C. C. A. 6); *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *N. L. R. B. v. Gluek Brewing Co.*,

not a legitimate ground for withholding enforcement of an otherwise valid order. *Idaho Potato Growers v. N. L. R. B.*, 144 F. 2d 295, 307-310 (C. C. A. 9), certiorari denied, 323 U. S. 769; *N. L. R. B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895 (C. C. A. 2); *N. L. R. B. v. John Engelhorn & Sons*, 134 F. 2d 553, 557-558 (C. C. A. 3); *N. L. R. B. v. Gluek Brewing Co.*, 144 F. 2d 847 (C. C. A. 8). This Court will "not assume that [the A. F. L.] will not respect its decision," and there are ample means "to enable the court to protect its order." *National Broadcasting case, supra*, at p. 900.

POINT II

The Board's order is valid

The Board's order requires respondent to cease and desist from its unfair labor practices, to cease giving effect to the illegal closed-shop contract dated March 5, 1946, to withhold recognition from the A. F. L. unless and until it shall have been certified by the Board as the exclusive representative of the employees, and to post appropriate notices (R. 80-83). The validity of these provisions on the findings made is well established.¹³

et al., 144 F. 2d 847, 853-854 (C. C. A. 8); cf. *N. L. R. B. v. Remington Rand, Inc.*, 130 F. 2d 919, 936 (C. C. A. 2); *N. L. R. B. v. Goodyear Tire and Rubber Co.*, 129 F. 2d 661, 664 (C. C. A. 5).

¹³ The validity of the Board's order on the findings made is not challenged.

CONCLUSION

It is respectfully submitted that the Board's decision is reasonable in finding that respondent's conduct here in question constituted a violation of Section 8 (1) of the Act, that its order is valid, and that a decree should issue enforcing the order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(6) The term “commerce” means trade, traffic, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement

or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

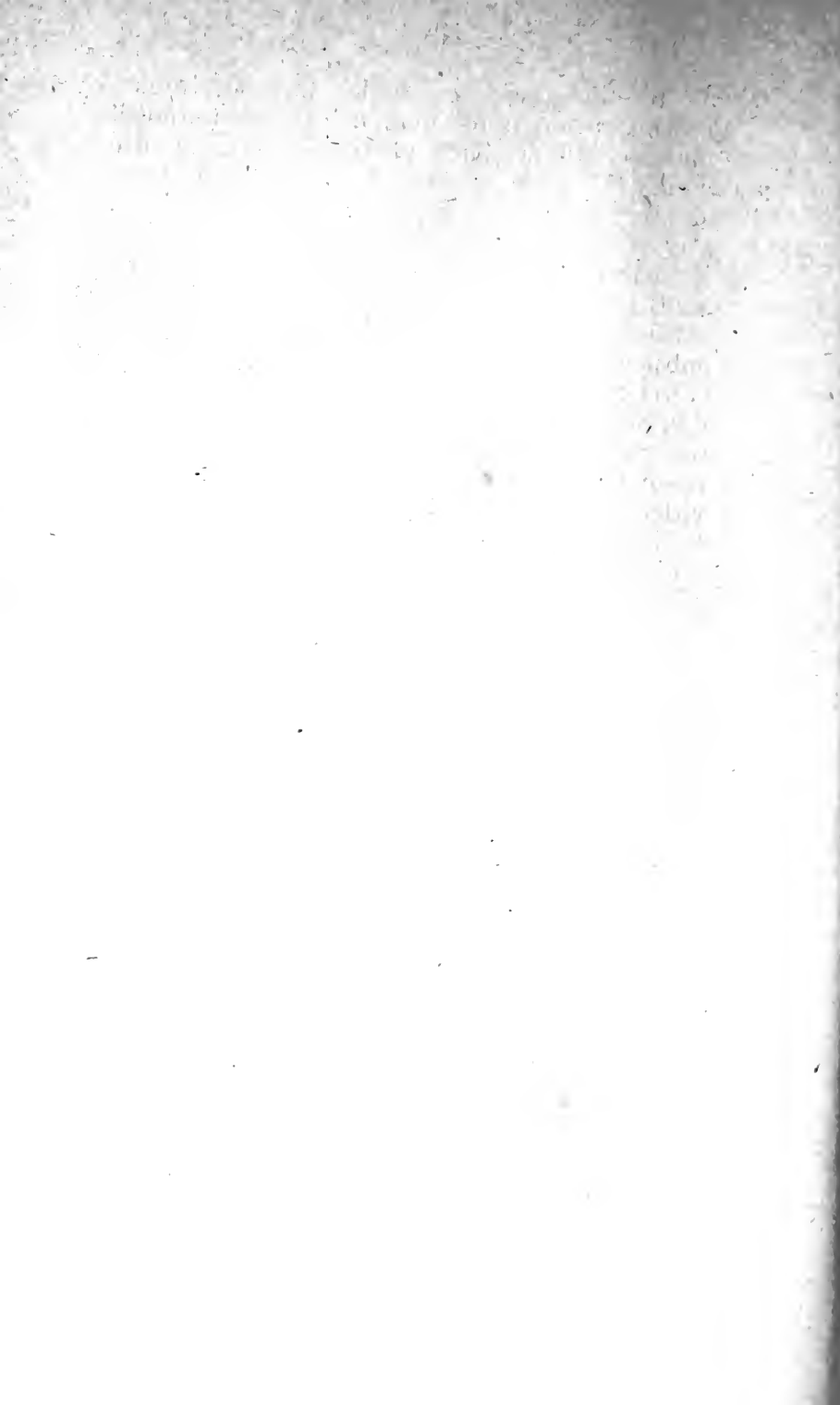
PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings

as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).



No. 11,449

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AFL, and CALIFORNIA STATE
COUNCIL OF CANNERY UNIONS, AFL,
Plaintiffs in Intervention,

vs.

NATIONAL LABOR RELATIONS BOARD,
Defendant in Intervention.

BRIEF FOR INTERVENORS.

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FILED
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PAUL P. O'BRIEN,





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NATIONAL LABOR RELATIONS BOARD,	<i>Petitioner,</i>
vs.	
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, and CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, AFL,	<i>Plaintiffs in Intervention,</i>
vs.	

NATIONAL LABOR RELATIONS BOARD,	<i>Defendant in Intervention.</i>
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BRIEF FOR INTERVENORS.

I. STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked by petitioner, as we understand its position, under Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 160(e)) hereinafter called the "Act". The Act was amended by the Labor Management Relations Act of 1947. (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947, 61 Stat., 29 U.S.C.A. Sec. 141 et seq. (1947 Supp.).)

II. STATEMENT OF THE CASE.

This case will test before this Court the legality of a doctrine of the National Labor Relations Board that induced a break-down of the National Labor Relations Act in one of the nation's leading industries.

Because of its insistence upon an unrealistic approach to the problems presented to it, the Board placed the employers and workers in the canning industry of California, including both the respondent and intervenor here, in an impossible position. It denied to the employees in the industry, as well as in respondent's plant, the right to be represented by an authorized collective bargaining agency for a period commencing March 1, 1946, and not terminated to this very date. Indeed the proceedings which the Board undertook in this case began in July, 1945; yet at this writing, three years later, the Board has made no determination as to which, if any, bargaining agency may represent these workers.

The record of the Board, we believe, presents a failure of the administrative process. Although the National Labor Relations Act contemplated the designation of a collective bargaining agency by the workers, that purpose here has been frustrated. Because of its misinterpretation of the Act, the Board, instead of bringing about orderly collective bargaining, prevented such bargaining and endangered continued production in the canning industry of California. To this day the Board has designated no bargaining agency but, on the contrary, persists in charging the existing agency and the employers with accusations of unfair labor practice such as those herein involved.

The history of this case begins in 1939 when the company entered into an agreement with a local union of the A. F. of L. (R. 267, 311) designated as Federal Local 20676. The contract which the company consummated with this union, dated March 1 of that year, ran from year to year thereafter unless cancelled upon thirty days' prior notice by the parties.

In subsequent years the company continued to bargain with Local 20676. While the basic terms of employment were fixed by a master contract entered into between the employers' association, California Processors and Growers, Inc., hereinafter referred to as C. P. & G., and the union's representative, the California State Council of Cannery Unions (R. 304, 312), Flotill Products retained its independent status, stipulating to accept such terms as the master contract provided. In 1941 the company's stipulation provided likewise for a so-called closed shop for the employees. The supplement set forth that all employees were to join or be members of the union before commencing work and that they were to remain as members of the union for the duration of the contract. The company was also to deduct membership dues and individual fees from wages. (R. 276.)

The local and the company renewed their stipulation in 1943, accepting an amendment to the master contract of that year. The supplemental memorandum of 1941, providing for a closed shop, remained in effect concurrently with the various master contracts.

The basis of the Board's case lies in the pendency of representation proceedings initiated in July, 1945, when an independent union, the Cannery and Food Process

Workers Council, filed a petition for certification covering the Flotill plant, as well as many plants in C. P. & G. (R. 87.) In the ensuing consolidated proceedings AFL and C. P. & G. objected to the petition upon the ground that it sought certification upon bargaining units consisting of certain designated areas in the Sacramento Valley rather than the territory covered by the functioning employer association and union council bargaining agencies. (R. 500.) After hearings were concluded and the matter lay undecided, FTA-CIO "intervened" in the dormant proceedings in August, 1945, and induced the Board to hold new hearings. (R. 501.) The Board permitted the intervention without the usual showing of substantial interest by the FTA-CIO prior to the hearing. (R. 29, 495.) Despite the strenuous objections of the AFL and the employers to these irregularities, and despite their contention that the election should not be held at so late a date in the season, the Board ordered the election in October, 1945.

The Flotill workers voted on October 15, 1945. (R. 325.) Of 205 valid votes cast AFL received 105, CIO 100, and the Independent none. Because of the Board's further irregularities in conducting the election, AFL filed objections to it (R. 474), and the Board on February 15, 1946, in its "Supplemental Decision and Order" (R. 48-67) sustained the objections.

The Board specifically found that the AFL's objection that the election had been held at too late a date would necessitate in another election balloting during the height of the ensuing season. (R. 266-67.) Recognizing that the existing contract would be enforceable until

March 1, 1946, the Board realized that a period of at least four months would expire before the peak of the season when the next election could be held, and "with considerable reluctance" (R. 58) it ruled that "none of the unions is entitled to exclusive status after the bargaining date". The Board went on to say (R. 58, 59):

"In accordance with well-established principles, the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as a representative of its members. In this state of the record no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date; the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in sub-section 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions now existing by virtue of the foregoing agreements."

The Board subsequently ruled that this portion of its opinion did not constitute an "order" upon the employers but merely a statement of what the Board believed to be the law. (R. 97, 98.)

It will be remembered that the 1941 existing closed shop contract of respondent and AFL provided for self-renewal unless terminated prior to March 1 of any year. Consequently on March 1, 1946, in order to comply with the Board's "suggestion," the company would have been compelled to refuse to recognize the incumbent bargaining agency, unilaterally to give notice of termination of the existing contract and to disrupt the extant conditions of

hiring and employment. AFL insisted that the employer would frustrate its bargaining obligations if it undertook any such revolution in its relations. As a result the employer continued the existing conditions and reaffirmed the union security provisions of the 1941 contract by entering into the contract of March 5, 1946, which is the subject-matter of the present proceedings. (R. 91, 280.)

The C. P. & G., the association bargaining agency in the canning industry, facing a parallel problem, also concluded a union shop contract with the AFL in the same month of March, 1946. (N.L.R.B. & Bercut Richards Packing Co. et al., No. 9499 in the United States Circuit Court of Appeals for the Ninth Circuit.) The Board insisted this contract, like the Flotill contract, violated the Act. Claiming that the association transgressed an earlier consent decree, which in substance required C. P. & G. to abide by the National Labor Relations Act, the Board filed contempt proceedings under that decree in this Court. On July 15, 1945, this Court discharged the Board's rule to show cause and denied the Board's petition, and thus as we shall point out, *infra*, sustained the validity of the questioned contract.

Thereafter on August 31, 1946, the Board held the second election at the Flotill plant. Again the AFL received the plurality of the valid votes cast. 535 employees voted for AFL, and 358 for CIO. But this election was challenged by FTA-CIO in September, 1946, and the Board failed to act on the objections from that date until January 20, 1948, a period of almost a year and a half.

In the interval, as in the prior period, the Board imposed upon the parties an interregnum of no bargaining. Although as we have pointed out, the Board originally expected this period to be no longer than four months, it became no less than three years. Finally on January 20, 1948, upon petition of the AFL for certification, the Board dismissed the entire representation proceedings upon the ground that CIO had failed to comply with the Labor Management Relations Act of 1947. (Daily Labor Report, January 20, 1948, p. A-8.)

We believe that this record displays an administrative failure to effectuate the Act. Since July, 1945, when the first rival petitions for certification were filed, until the present date, the Board has not designated a collective bargaining agency to represent the employees. Although AFL received a plurality of votes in two elections, the Board has failed to certify it as the bargaining agency. The Board has not only visited upon the employees a three year period during which the purposes of the National Labor Relations Act have been frustrated, but it has taken the second affirmative step of attempting to prevent the employer for a period of over two years from exclusively recognizing the labor union with which it had previously contracted for a period of over five years. The administrative break-down is not only a matter of history; the Board has still failed to name a bargaining agency, and its last act in the matter was to dismiss AFL's motion to be certified.

We submit this record emanates from the first irregular intervention of the Board at the instance of FTA-CIO when it permitted that union to intervene in the repre-

sentation case; that it was compounded by the Board's calling of an election at a time when the season had practically concluded, and by an irregular conduct of that election; and that it culminates in its present order. During this entire period of time the workers were denied their right of collective bargaining despite the fact that this Court did not support the Board's position in that respect and despite the fact that the Board's cease-bargaining rule cannot be supported in policy, in the Board's rules or cases, or in the decisions of the Court.

We believe and shall point out that the Board has brought about this unfortunate debacle by a rigid application of a doctrine which necessarily in this case, or any other, would produce the frustration of collective bargaining. If ever there was a record which proved that fact this three-year instance of failure of the Board's process does so.

III. STATEMENT OF THE ISSUE.

This proceeding emanates from charges filed with the Twentieth Regional Office of the National Labor Relations Board on March 19, 1946, by FTA-CIO, which alleged that the contract of March 5, 1946, violated Section 8 (1) of the Act; that the company granted AFL access to the plant and afforded it other assistance while refusing such privileges to the FTA-CIO; that it violated Section 7 of the Act by discharging an employee, one Sandrio, on November 17 or 18, 1945, and that it urged employees not to affiliate with CIO but with AFL. (R. 1.) The regional office issued a complaint including these

various charges. (R. 5.) The Trial Examiner only partially sustained the complaint, holding that the respondent be prohibited from entering into any exclusive contract with AFL, from recognizing AFL as the exclusive representative of its employees, and from interfering with FTA-CIO (R. 102, 103) but dismissing the remainder of the complaint. On August 19, 1946, the Board affirmed the ruling of the Trial Examiner and ordered "the complaint insofar as its allegations that the respondent discriminated against its employees within the meaning of Section 8 (3) of the Act be dismissed." (R. 83.)

The issue before this Court resolves into the question of whether or not the employer's continued recognition of an incumbent union and the reaffirmation by contract with it of extant conditions of hiring violates the National Labor Relations Act because the employer, in the words of the Board (Brief, p. 6) "knew that a representation question was pending" by reason of the claim of a raiding CIO union.

IV. ARGUMENT.

The Board contends that "execution of the contract of March 5, 1946, interfered with the employee's freedom of choice, in violation of Section 8(1) of the Act." (Brief, p. 8.) Section 8(1) of the Act provides that it shall be an unfair labor practice "to interfere, restrict or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 frames the right of employees to select representatives of their own choosing.

There is not a single word in the Act stating that the bargaining relationship between a recognized union and an employer must terminate upon the expiration of an existing contract after another union challenges its majority status.

This doctrine, fashioned by the Board out of whole cloth, is nothing less than attempted administrative legislation. Evidently the Board is so anxious to preserve an alleged "right of free choice" (Brief, p. 8) on the part of the employees that it is willing to strike down the union previously selected through an exercise of that free choice.

This proposed administrative legislation of the Board is vague and diffuse. The Board does not define when the challenge of the rival union destroys the bargaining relationship of the recognized union. Does the nullification occur when the challenger presents a claim to the Board that it represents the employee? Does it take place after the Board makes an investigation and determines to proceed with an election? Does it operate only when the employer is notified that the challenger has presented the claim or that the Board has determined to proceed? Does it eventuate if the employer learns of the challenger's claim indirectly without official notice from the Board?

Suppose the employer and the incumbent union agree to continue an expired contract after a rival union makes a claim of representation but before the Board finds that there is an insufficient showing by the rival union to justify an election. Would the continuation of the

contract during that interim constitute an unfair labor practice?

Although the Board seeks to legislate, it does not define the limits of its doctrine, but leaves the parties, instead, in the untenable position of acting *in terrorem* of future unfair labor practice charges.

We submit that the Board's inclusion in the Act of this new provision finds no support in policy, in its own decisions, or in the rulings of the Courts.

A. THE BOARD'S NULLIFICATION OF A RECOGNIZED UNION'S EXCLUSIVE RIGHT TO BARGAIN WITH THE EMPLOYER AFTER THE CHALLENGE OF A RIVAL UNION CANNOT BE JUSTIFIED BY CONSIDERATIONS OF LABOR RELATIONS POLICY.

The "basic doctrine of neutrality" invoked by the Board does not sanction the termination of industrial government through collective bargaining at the instance of the challenging union.

As we shall point out, the Board's "doctrine" would endow a challenger with bargaining rights despite the fact that it made only a minority showing; the doctrine would establish an unworkable multiple representation and multiple grievance procedures; it would encourage industrial strife; it would practically prevent collective bargaining in a seasonal industry, and finally it is wholly unnecessary to a free expression of choice of a bargaining representative by the workers.

1. **The Board's order assumes that the challenger has a sufficient following to justify the revocation of the certification of the union which the Board previously found represented a majority of the workers; yet the challenger makes only a minority showing.**

The Board's position reposes in a minority of the workers the power to thwart the will of the majority. Upon a showing of 30% of the employees in the bargaining unit, the Board will direct an election, and coincidentally prevent the certified union from continuing to represent the workers after an existing contract expires. It may very well be that the challenger never wins the support of more than the 30% minority, and it may even lose that support in an election. Indeed many challengers lose in subsequent elections. Yet the Board grants the minority union the power to disrupt the majority union's right to continue to represent the workers.

This implied revocation of the majority union's certification violates the precept of the Act that the majority of the workers have the right to choose and to enjoy the protection of a collective bargaining agency. It reverses the presumption that a state of facts, once found, continues to exist; it illogically gives the benefit of the presumption to the challenger, holding that it, just as much as the confirmed representative, represents the majority of the workers.

The fact that the Board intervenes on behalf of the challenger, setting aside in this case a long-standing relation of employer and incumbent union, gives a definite advantage to the challenger. By the very act of the challenge it has prevented the employer and the incumbent from continuing to deal. The attacking union

will exploit this fact with propaganda to the effect that the N.L.R.B. no longer permits the incumbent to represent the workers and that it cannot extend or renew the existing contract or enter into a new one. By this means the rival union shakes the confidence of the workers in the established agency. The Board has apparently gone over to the challenger's corner, and the workers become confused by the umpire's act of favoritism.¹

There is no warrant in the Act to frustrate the choice of the majority and to prevent it from functioning upon the challenge of a minority.

¹The National War Labor Board ruled in a number of cases that during the pendency of proceedings before it the *status quo* should be maintained and that existing agreements should be extended for such period. In *National Carbon Co.*, 14 War Labor Rep. 21 (1944), Chairman Taylor speaking for Board said:

"The Board believes that as a general rule the status quo at the expiration date of a collective bargaining agreement should be maintained pending the completion of a new agreement of final settlement of any issues in dispute. This policy reflects the consistent attitude of governmental authorities in similar situations and is identical with the procedure voluntarily adopted by many employers as a means of maintaining stable and harmonious relations with responsible unions which represent their employees in collective bargaining. By following this policy the Board does not prejudge contests over such matters as majority status or union responsibility but merely postpones final argument and decision thereon until after the case has been fully argued on the merits before a panel or other instrumentality of the Board. The policy of the Board, as thus outlined, corresponds with the traditional practice of our courts to maintain the status quo of the subject matter in dispute pending a final determination of the case on its merits."

See also: *In re Montgomery Ward & Co.*, 13 War Lab. Rep. 454 (1944); *United States Automatic Transp. Co.*, Case No. 2570-CSD (Dec. 14, 1944) (unreported); *Western Union Telegraph Co.*, 13 War. Lab. Rep. 297 (1943); *Lamson & Sessions Co.*, 8 War Lab. Rep. 295 (1943).

2. **The Board's order providing for multiple representation and grievance procedures attempts to establish an impossible practical situation in violation of the Act.**

The Board's supplemental decision and order (R. 58-59) provides:

"In accordance with well-established principles, the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as a representative of the members."

The Board thus directs the employer to deal with three unions; it decrees a legally sanctioned triple unionism. The Board seeks to erect a condition which is unworkable from a practical standpoint and unsupportable legally.

Labor relations are dynamic and call for a succession of day to day adjustments reaching from agreements on wage and manpower problems to the gamut of adjustments made through the grievance machinery. Indeed, over a period of years, such as has expired here between the filing of the petition of FTA-CIO and the present time, the problems will range far beyond those solved through the grievance procedure. The grievance machinery itself is a form of government as essential to industrial order as the maintenance of the judicial system is to civic peace and stability.²

To split industrial government into autonomous and competing systems is to set the stage for chaos. In the

²One of the purposes of the Railway Labor was "the prompt and orderly settlement of all grievances". See *Lapp, How to Handle Labor Grievances*, 11, 12 (1945).

first place the very value of the grievance machinery lies in the establishment of uniform decision and the building of precedent. Interpreting the collective bargaining contract, the grievance board will build a body of decision that defines the rights and duties of the parties. With three such procedures working simultaneously and independently, uniformity becomes impossible because each board may reach a different and opposing decision.³

In the second place, the competitors here are not disinterested neutrals but fervid contestants each trying to displace, and indeed to liquidate the other. Each union will use every complaint of a member to build up a grievance which it will vigorously press for adjustment, in the hope of winning a competitive advantage over its rival. Each grievance becomes a *casus belli*, a stepping stone to the embarrassment of the rival union, a source of dissension. Thus the Board transforms the instrumentality of the grievance machinery from a method of promoting industrial peace to a means of insuring industrial discord. No industry could live under a regime charged with such dynamite.

Not only does the Board create an impossible practical situation; it likewise violates its own mandate. The Act provided for a system of majority rule in labor relations; the majority's choice was to be the exclusive

³In *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 at 346, 64 S. Ct. 582 (1944), the Supreme Court said that deviations from the interpretations of the collective bargaining contract by the contracting union "introduce competitions and discriminations that are upsetting to the entire structure".

representative; yet the Board's present decree fixes a form of proportional representation.⁴

That Congress intended no statutory sanction of such plural representation,⁵ but the very opposite, is proven

⁴The United States Supreme Court has recognized the importance of collective bargaining by the majority rather than the execution of separate labor contracts by individual workers, and it has determined that the Act contemplates the former and not the latter. In *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332 (1944), cited in Board's Brief, p. 12, Justice Jackson speaking for the Court said:

"It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment."

⁵The Senate Report (S. Rep. 573, 74th Cong., 1st Sess., p. 13 (1935)) on the National Labor Relations Act said:

"Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees."

The House Report (H. Rep. 1147, 74th Cong., 1st Sess., pp. 20, 21 (1935)) read:

"There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement there would immediately result a marked increase in the membership of the labor organization. On the other hand, if better terms were given to non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

"* * * If, however, the company should undertake to deal with each group separately, there would result the conditions

by the Congressional record at the time of the passage of the Act.

To enforce the Board's order would therefore violate the very purpose of the Act: exclusive representation by the majority agency. To decree that during the interval from a petition for certification and the designation of a representative, the established union cannot continue to serve but that representation must be fractionalized is to require a period of unremitting conflict during which the grievance machinery becomes a weapon of warfare. How could a cannery, dealing with a seasonal and perishable crop, operate, when each side is legally delegated to compound grievances and to demand representation of its constituency? Each contender would beset management with a myriad of demands and a succession of threatened stoppages, making production of a perishable product a matter of uncertainty and improbability.

The Board has no excuse in theory, law or practice to attempt to impose such an impossible condition upon one of California's chief industries.

pointed out by the present National Labor Relations Board in its decision in the Matter of Houde Engineering Corporation (1 N.L.R.B. 35 (Aug. 30, 1934)) :

"It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the (twenty-one) committees * * * Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks."

3. The Board's order encourages industrial strife and invites internecine union struggle.

As the Labor Management Relations Act of 1947⁶ decrees, one of its purposes is to encourage the practice and benefits of collective bargaining. (Section 10.) Through the instrumentality of the collective bargaining contract the social losses of industrial warfare have been reduced and many times avoided.⁷

When the collective bargaining contract collapses labor relations are reduced to chaos. In the absence of a method to adjust their disputes the workers have recourse only to strikes and stoppages.⁸ Each grievance

⁶Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947), 61 Stat., 29 U.S.C.A. Sec. 141 et seq. (Supp. 1947).

⁷The Circuit Court of Appeals for the Fourth Circuit states:

"The purpose of the written trade agreement is not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future * * * it provides a framework within which the process of collective bargaining may be carried on." *N.L.R.B. v. Highland Park Mfg. Co.*, 111 F. (2d) 632, 638 (C.C.A., 4th, 1940.) See *Perlman & Taft, History of Labor in the United States, 1896-1932*, p. 10 (1935).

⁸Chief Justice Stone, speaking for the Supreme Court in *Steele v. Louisville & Nashville R.R. Co.*, 323 U. S. 192, 65 S. Ct. 226 (1944), points out that the elimination of a collective bargaining representative for a craft or minority thereof leaves to it "the only recourse * * * to strike, with the attendant interruption of commerce, which the Railway Labor Act seeks to avoid". This fact was recognized by the National War Labor Board in the *National Carbon Co.* case, *supra*, footnote 1, where Chairman Taylor said:

"It has become increasingly evident that lack of contractual relationship between employers and employees defining wages, hours, and working conditions in the interim pending the completion of a new contract, creates a feeling of uncertainty on the part of employees which adversely affects production and harmonious relations within the plant. Experience has demonstrated, furthermore, that this uncertainty reflects itself in the atmosphere of collective bargaining and lessens the chances for a peaceful and speedy disposition of issues in dispute."

becomes a potential work stoppage. The workers' knowledge that they have no definite means for the presentation of their position in any dispute leads to psychological uncertainty. Out of this welter of insecurity come strikes and disorders.

Indeed, in this case the questioned contract provided that for its duration, the union would not strike. The Board must, if it follows the doctrine that the whole contract with AFL falls, contend that the no-strike clause falls, too. The Board's reasoning, then, leads to the destruction of this protection of industrial peace, although the preservation of that peace is one of the basic purposes of the Act.

Under the Board's doctrine this unhappy state of possible discord may be long-continued. After the holding of an election, the certification of the winning union may be delayed. The election may be challenged; the very process of investigating the challenge may be time-consuming. If the challenge to the election is sustained, another election must take place. In this very case the petition was filed in July, 1945; the first election took place in October, 1945; the election was challenged; the Board sustained the challenge on February 15, 1946; a second election occurred in September, 1946; this election in turn was challenged, and in January, 1948, the Board, throwing its administrative hands into the air, dismissed the whole proceeding, failing to certify a bargaining representative. Hence almost *three years* passed between the petition and the final debilitory order.

The Board ordered that the parties could not recognize their contract after its expiration in March, 1946. Hence

the Board decreed an interregnum of chaos for a period of almost *two years*.

Moreover, the Board's offer of equal bargaining status to a challenging union is an invitation to inter-union warfare. The Board sets up inducements to raiding by unions when it gives such a union the power to deal with the employer. The rule of the Board, perhaps originally fashioned to reduce the power of a company-dominated union, becomes anachronistic in a day when company unions are few and inter-union rivalries many.⁹ At a time when every effort is extended to prevent jurisdictional strife, the Board encourages it.¹⁰

⁹The Board has itself recognized the value of stability of industrial relations in the *Matter of Reed Roller Bit Company*, 72 N.L.R.B. 927, wherein it upheld a contract of two years' duration as a bar to a rival union's petition for certification. The Board said, at p. 930:

"For large masses of employees collective bargaining has but recently emerged from a state of trial and error, during which its techniques and full potentialities were being slowly developed under the encouragement and protection of the Act. To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, the emphasis can better be placed elsewhere. We think that the time has come when stability of industrial relations can be better served, without unreasonably restricting employees in their right to change representatives, by refusing to interfere with bargaining relations secured by collective agreements of 2 years' duration."

¹⁰Gerhard P. Van Arkel, when serving as General Counsel for the NLRB and appearing as such in the Board's brief filed herein, expressed the reasons for the Board's change in policy, upon the problem of stability in labor relations, and indicated disagreement with procedures which would encourage inter-union rivalry in an address delivered November 7, 1946, at Washington, D. C., at a conference of labor attorneys, from which we quote extracts:

"In these respects and in substantial measure, therefore, Board policy has been moving away from an early concept

The Board's rule would destroy the industrial peace assured by the collective bargaining contract during the long period of representation proceedings. The Board

of unfettered freedom of choice in the direction of limited access to its services. The motivating factors, sometimes expressed and sometimes inchoate, which lie behind these changes and which illustrate the accommodation of law to experience of which I have earlier spoken appear to me as follows:

"1. The fact, already mentioned, of the increase in trade union membership and collective agreements. With only the rarest exceptions, the company-dominated union and the employee representation plan are things of the past; equally rare is the large industrial enterprise which is not operating under a collective bargaining agreement with a trade union. *Those agreements raise vested interests, quite as tenaciously fought for as any more clearly recognized property right;* a union which has spent large sums of money, expended many hours of labor, and struggled for a long period of time to establish itself does not willingly bow out to a newcomer. The employer has a strong stake in the continuance of such a relationship once established; for he, too, will have devoted much of his time and that of his supervisory staff to building up workable relationships; only unwillingly, normally, will he forsake that investment in order to begin anew with different representatives. The public, as well, has its interest in a stable relationship, but subject to change at whim.

"2. The fact, too often overlooked, that *employees have considerable freedom to change representation within their own organizations.* . . .

"3. *The unhappily increasing, rather than diminishing jurisdictional strife between the American Federation of Labor and the Congress of Industrial Organizations.* One may agree that competition within the labor movement is as healthy as it is in the business world without agreeing that cut throat competition is desirable in either. Some unions are approaching a position where their major effort, money, and time are expended in resisting, or in engaging in, raiding tactics rather than in the purposes for which they were organized. Without attempting to cover the entire problem, it does seem to me that the most useful contribution which the Board can make is, generally speaking, in *protecting the position of a union which has achieved a recognized position and stable bargaining relationships with an employer, rather than becoming the ally of him who seeks change.*" (Italics ours.) 19 LRRM 130.

would also encourage jurisdictional raiding. Neither of these results are compatible with the purposes of the Act.

4. **The Board's doctrine would make it a practical impossibility to determine a bargaining representative in a seasonal industry, such as the canning industry of California.**

The ruling of the Board that the existing relationship is destroyed by the filing of a petition for certification subjects the canning industry of California, in particular, to dissension and discord in perpetuity.

During the past five years AFL and respondent have entered into collective bargaining negotiations and consummated collective bargaining agreements prior to March of each year. Due to the pressure of high production during the season, it is impossible at that time to work out a collective bargaining contract, and it has therefore been the practice of the industry to consummate such contract prior to the height of the canning season. In the event that a petition for certification could arrest the process until an election were held and the Board certified a collective bargaining agency, the industry would be subjected to endless dissension. A rival union could file a petition at any time during the year; an election could only be held during the summer months when the canneries were all operating; certification could be delayed by objections and investigations by the Board and, as a consequence, no bargaining agency would be permitted to function during the actual canning season.

The filing of such petitions could be repeated year after year and collective bargaining in the industry virtually eliminated. Such a prohibition of collective bargaining

in the canning industry over the years, with the consequence of disordered industrial relations and labor unrest, would seriously jeopardize one of California's principal industries. Notwithstanding the frustration of collective bargaining hereinabove described, and notwithstanding the violation of the purpose and provisions of the National Labor Relations Act thereby effected, the Board has attempted to enforce an order bringing about these very results.

5. **The employer's continued dealing with the certified agent does not interfere with a free expression of choice by the workers.**

So long as the workers have the full and free right to proselytize, campaign and vote for the challenging union, it is hard to see how their choice of a bargaining agency could be adversely affected by the continuation of the existing bargaining relationship.

We assume that any interference with such free choice is proscribed under the Rutland Court doctrine:¹¹ we probe here the narrow question whether the employer and the union can continue to handle their mutual problems and to contract. Of course any discharge of an employee because of union activity is unlawful. But must the incumbent union's right to deal with the employer also be excorciated?

We have pointed out the bargaining contract composes a kind of government for labor relations. There is no good reason why this government should be liquidated

¹¹*Matter of Rutland Court Owners, Inc.*, 44 NLRB 587 (1942), 46 NLRB 1040 (1943).

because an election has been called. It is certainly not customary in American political life for an incumbent to be removed from office because some one decides to run for his position. Nor has the incumbent's retention of office been a sinecure to reelection; in American history, incumbents have lost as often as they have won.

In labor relations the challenger has a great and inherent advantage which he may not enjoy in political life. The underlying drive of American workers, since labor unions began, has been for higher wages and better working conditions. The in-union, which has the responsibility of living up to settled contracts, which must maintain harmonious relations and which has a record in the shape of the contract, cannot compete with the challenger in promising "better and more." The challenger, free and footloose, can promise pie in the sky.

Indeed the very right for which the incumbent and the employer contend here will not benefit but harm the incumbent in getting votes. While we believe that continued relationships, during election interims, is highly necessary to industrial peace, we do not think such continuity helpful to the incumbent union in the campaign. For its efforts to continue industrial government, it will be charged, as this AFL cannery union was charged, with "lying in bed with the employer", with making deals with the employer, and with a multitude of forms of corrupt action. Thus the challenger will exploit to its advantage every attempt by the incumbent to preserve order and to avoid interruptions of production.

The task of collective bargaining obviously calls for mutual concession by employer and union. This process

may extend through a relatively long interval between petition and certification. The challenger will seek to convert each effort or concession for reconciliation into votes of censure. Hence the incumbent, striving for industrial peace, may suffer with the electorate.

The Board has made a fetish of an academic neutrality; it ignores the reality and misconstrues the continued relationship into a great advantage to the incumbent, whereas, in fact, it may sometimes be a detriment.

In conclusion, we submit the Board's thesis finds no support in policy. In effect it disrupts the representative chosen by the majority upon the challenge of a minority and prevents the functioning of the selected bargaining agency. In its place the Board would set up a multiple administration of labor relations which is not only impractical but also incompatible with the majority representation provided by the Act. The doctrine encourages industrial strife by removing the protection of the collective bargaining contract and by encouraging jurisdictional raiding. It imposes an unworkable practical situation in a seasonal industry. Finally the Board's rule is not necessary to insure a free expression of choice by the workers.

We believe the Board has at least partially recognized these narrated dangers. As a result, the Board has itself recently retreated from and partially abrogated the position it took in this case.

B. THE BOARD ITSELF IN DECISIONS RENDERED SUBSEQUENT TO THE INSTANT ONE, AS WELL AS IN THE PRESENT PROCEEDINGS, HAS REJECTED ITS NULLIFICATION OF BARGAINING THEORY.

The Board's dual contradiction of its present position appears in some of its recent cases and in its treatment of the instant matter; we now consider separately each of these subjects.

1. **Since the rendition of its decision in the instant case, the National Labor Relations Board has recognized the danger of its doctrine of prohibition of collective bargaining during representation proceedings and has partially repudiated that doctrine.**

In three decisions since the ruling in the instant case the National Labor Relations Board has questioned its own attempt at administrative legislation in prohibiting collective bargaining with the incumbent union during representation proceedings and has both repudiated and specifically limited the doctrine. We shall discuss these decisions in their chronological order.

The first is in the matter of *Ensher, Alexander & Barsoom, Inc.* and *Food, Tobacco, Agricultural and Allied Workers Union of America, CIO*, and *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, and *California State Council of Cannery Unions, AFL*, and *Cannery Workers Union Local 857, AFL*, Case No. 20-C-1445, 74 N.L.R.B. 1443, a decision rendered on August 21, 1947, involving the same rival unions as appear in the instant proceeding.

The case is important in the first place because of the factors upon which the Board relied in reaching its con-

clusion that the complaint against the company should be dismissed. In alluding to the doctrine that exclusive collective bargaining is prohibited during a representation proceeding, the Board states, "That doctrine, necessary though it is to protect freedom of choice in certain situations, can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied." (p. 1445.) This is an important recognition on the part of the Board of the desirability of the "practice of continuous collective bargaining." Here the Board officially acknowledges that its "doctrine" would, if flatly applied, prevent continuous collective bargaining.

It is true that the Board in the *Ensher* decision holds the doctrine not applicable because of the factual situation in that case, but its recognition of the danger of the doctrine extends beyond that case. The effect of prohibiting continuous collective bargaining is just as onerous and disadvantageous in other factual situations as in the *Ensher* case.

In the second place, the decision of the Board in the *Ensher* case exposes the weakness of the Board's position here. In the *Ensher* case the Board dismissed the complaint on the ground that there was no real question of representation pending since the challenging union, the Independent, which had appeared on the petition in the election of October, 1945, "became defunct shortly after that date." (p. 1444.) Hence, states the Board, the employer did not commit an unfair labor practice when he signed a contract with the labor organization "claiming

to represent its employees''. The Board sustained the position of the employer because—

“There is no allegation in the complaint and no evidence that the AFL did not represent a majority of the respondent’s employees at that time, or that the unit covered by the contract was inappropriate. The respondent asserts that, because of the victory of the AFL in the election of October, 1945,⁵ and the respondent’s bargaining history with the AFL,⁶ it believed in good faith that the AFL continued to represent a majority of the respondent’s employees on February 27, 1946. (p. 1444.)

⁵Of 96 valid votes counted, 64 votes were cast for the AFL, 28 votes were cast for the Independent, and 4 votes for neither labor organization. In our Supplemental Decision and Order, issued on February 15, 1946, the Board vacated this election, as well as other elections involving employer members of the CP&G unit and other independent companies, at the instance of the AFL, because of certain procedural defects concerning eligibility to vote. *Matter of Bercut-Richards Packing Co. et al.*, 65 N.L.R.B. 1052.

⁶The respondent had had exclusive bargaining agreements with the AFL continuously at least since 1941.”

Each of the reasons which the Board sets out to exonerate the employer in the *Ensher* case, applies to the employer in the instant case.

First—there is no *allegation* in this complaint that the AFL did not represent a majority of the representative employees at the time the contract was signed.

Second—there is no *evidence* that the AFL did not represent a majority of the employees at the time the contract was signed.

Third—there is no allegation in the complaint and no evidence that the unit covered by the contract was *inappropriate*.

Fourth—the respondent asserted here that because of the victory of the AFL in the election of October, 1945, he believed in *good faith* the AFL continued to represent a majority of the respondent's employees on March 5, 1946. Indeed in the instant case the AFL won the election of October, 1945, obtaining 105 as against 100 of the 205 votes case. (R. 325.) The employer's honest belief in the continued majority of the AFL is corroborated not only by this October, 1945 vote, but by the fact that the election of September, 1946, gave AFL 535 votes as against CIO's 358.

Finally the respondent asserts here that because of its *bargaining history* with AFL it believed in good faith AFL continued to represent a majority of its employees. It is noted in the *Ensher* case that respondent had had effective agreements with the AFL continuously since 1941. In the instant case respondent had had effective bargaining agreements with AFL continuously since the same year of 1941. (R. 275.)

Each of the foregoing circumstances composed the reasons why the Board dismissed the *Ensher* complaint. The decision stated "under these circumstances we do not believe that the respondent's execution of the contract with the AFL on February 27, 1946, should be regarded as an unfair labor practice, even though it be technically true that the representation proceedings was still pending before the Board." (p. 1445.)

Each of these reasons, as we have noted, were equally applicable in the present situation. Although the Board points out in the *Ensher* case that the Independent was

defunct when the contract was signed, the CIO did claim to represent the employees prior to the election of September, 1946, and on August 16, 1946, "the Board granted CIO a place on the ballot." (p. 1449.) It was on the basis of the pendency of these representative proceedings that the Trial Examiner in the intermediate report held that an unfair labor practice had been committed. Yet the Board, recognizing the force of the above mentioned facts as to the employer's good faith, dismissed the case, despite the fact it was "technically true that the representation proceedings (were) still pending." The Board found the value of continuous collective bargaining overcame any advantage derived from applying the doctrine which the Board urges here. There can be no doubt that the Board's position changed between August 19, 1946, when it rendered the *Flotill* decision and August 21, 1947, when it decided the *Ensher* case.

The Board's reluctance to apply the cessation of bargaining doctrine became even greater on February 11, 1948, when it rendered a decision in the case of *N. L. Koin, et al., doing business as The Ellis Canning Company and Warehousing, Processing & Distributing Union No. 217*, affiliated with *International Longshoremen's & Warehousemen's Union* (CIO). Cases Nos. 17-R-1339, 17-C-1383, February 11, 1948 (76 N.L.R.B. No. 13).

In this case the Board states the fact to be "that there existed a real question concerning the representation of the employees in question". It then recognized that its *Bercut Richards* decision (65 N.L.R.B. 1052), upon which the *Flotill* case rests, might lead to the conclusion that the employer had committed an unfair labor practice;

yet the Board upheld the Trial Examiner's following report:

"Clearly respondent herein knew a 'real question' concerning representation existed when it agreed with the AFL in April, 1946, to enforce the closed-shop provision of its contract. Obviously also enforcing this provision was not extending or renewing an existing contract or entering into a new one. If knowledge of the question concerning representation forecloses the respondent from enforcing the closed-shop provision on request of the Union, the doctrine of the Phelps-Dodge case is extended. In other words in so holding the undersigned would be deciding that 'If, during the pendency of an election directed by the Board to resolve a question of representation, an employer extends or renews an existing contract, with a labor organization or enforces a provision of an existing contract not theretofore enforced since the signing of that contract—he violates the Act, insofar as that organization is accorded recognition—or employees are required to become or remain members thereof.' Such an extension of the recognized doctrine seems to the undersigned to be unsound. It would be holding that a respondent and a union representing its employees could never for any reason, however laudable, agree not to enforce a union security provision without danger of being forced to waive thereafter the provision if a rival union started organizing and filed a petition with the Board." (p. 10.)

The Board thus concludes that a change in actual conditions of employment, such as the enforcement of a closed shop provision which prior thereto had been dormant, would not constitute an unfair labor practice,

even though effected during the pendency of a representation proceeding. It refused to extend the "recognized doctrine" to a situation in which the employer affords the incumbent union the protection of a closed shop. The Board argues that in enforcing this provision it was not extending nor renewing an existing contract or entering into a new one. The prohibition as to exclusive bargaining, according to the Board, applied only to such extension or renewal.

We submit that the Board, in substance, rejected its own doctrine of cessation of exclusive bargaining. So far as the enforcement of the closed shop provision by the employer might be a violation of Section 8 (a) (1) of the Act, the *Ellis* decision is indistinguishable from the situation in which a closed shop provision was extended or renewed. To continue a closed shop provision which was being observed by the employer is certainly less of an interference with the so-called free choice of the workers than the imposition of a closed shop where none had been before. In the *Ellis* case the workers who had been employed under open shop conditions found themselves, after a rival union petition had been filed, faced with a closed shop. This change in the real conditions of employment is a far more drastic and important departure from neutrality than the continuation in the *Flotill* case of the same conditions as those which had been enforced for a prior period of four years.

It is no answer to say that in the *Ellis* case the dead letter of the contract provided for a closed shop and, therefore, the employer had the right to enforce it during the pendency of a proceeding. The alleged vice of the

action of an employer during the pendency of a proceeding lies in discrimination in favor of the incumbent union. The Board said that such discrimination here impaired the free choice of workers; yet in the *Ellis* case the discrimination, if any, would, according to the Board's theory, be twice as effective and consequently twice as unlawful and partisan. In the *Ellis* case the questioned action consisted not in maintaining existing conditions but in imposing an entirely new condition in favor of the incumbent union, and this new condition is nothing less than a complete closed shop.

In February, 1948, the Board again retreated from the cease-bargaining position. In the matter of *Eaton Manufacturing Company, Wilcox-Rich Division and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), the Board rejected the position of a Trial Examiner who invalidated a contract with an incumbent union

“* * * containing provisions which conditioned employment on continued membership in the AFL * * * in the face of the CIO representation petition and the CIO unfair labor practice charge, both of which were pending undetermined before the Board at the time the contract was executed, and at a time when the respondent was aware, as evidenced by the stipulation executed simultaneously therewith, that there existed a real question concerning representation affecting its Saginaw employees.” (Intermediate Report, p. 24.)

The Trial Examiner condemned the contract in no uncertain terms

“* * * under the circumstances and for the reasons expressed in the *Midwest Piping* case, the principle of which is clearly controlling here, the undersigned finds that the respondent, by its conduct in executing the Master Agreement in May, 1946, contravened the letter and spirit of the Act, breached its obligation of neutrality, indicated its approval of the AFL, accorded the AFL unwarranted prestige, encouraged membership in the AFL, discouraged membership in the CIO, and thereby rendered unlawful assistance to the AFL.” (Intermediate Report, p. 24.)

Yet the Board rejected this conclusion, stating:

“The Trial Examiner found that the respondent violated Section 8 (1) of the Act by executing the 1946 agreement with the UAW-AFL while the UAW-CIO’s previously filed representation petition was pending before the Board undetermined. Because of the UAW-CIO’s subsequent conduct in *preventing a prompt determination** by filing an unfair labor practice charge against the respondent which we find to be groundless, we do not adopt this finding.” (Decision, p. 6.)

The Board held that the attacked contract with the incumbent union in the *Eaton* case was properly consummated despite the pending representation case of a rival union. The Board holds the representation proceedings were not promptly determined and therefore not a sufficient basis to invoke the *Midwest* doctrine. An even greater delay occurred in the present case. Whether the delay resulted from the nonaction of the rival union or the ineptness of the Board is immaterial. The Board in

*The emphasis here and *infra* are our own.

the *Eaton* case holds delayed proceedings do not invoke the cease-bargaining doctrine and do not operate to defeat the rights of the incumbent union.

The *Eaton* case, in principle, is an abandonment of the *Midwest* doctrine. It is a further recognition by the Board, reached after its decision here, that the cease-bargaining doctrine is not tenable.

These recent decisions of the Board show that it coincidentally questions and circumscribes the doctrine for which it contends so strenuously in the present case.

The Board is in a further contradictory position in the application to the present case of the rule that an employer is obligated by the Act to bargain with the existing agency.

2. The Board has not followed the cease-bargaining theory in the present proceedings.

The Board is in the position here of having ordered respondent both to bargain and not to bargain with AFL.

The Board has elaborated the duty to bargain collectively both in its reports and in the cases. The Board has ruled that this duty includes the obligation to negotiate concerning the modification, interpretation and administration of an existing agreement. (9th Annual Report, p. 46; 10th Annual Report, pp. 49, 50.) The Board's cases clearly enforce this obligation.¹² The duty to bargain, it will be noted, encompasses the administration of an existing collective bargaining agreement.

¹²See for instance the following cases: *In the Matter of Golden Turkey Mining Co.*, 34 NLRB 760 (1941); *In the Matter of Eastern Supply Co.*, 47 NLRB 49 (1943); *In the Matter of Carroll's Transfer Co.*, 56 NLRB 935 (1944).

In this case the Board recognized the legal requirement to abide by the existing contract between the employer and the AFL despite the coexistence of a petition for representation.

Although the first election in this case occurred during the life of the contract, the Board ruled that the duty of the employer to bargain with AFL was not affected by the pendency of the representation proceedings.

The Board held that even if a new bargaining agency were selected, it would only function *after* the expiration of the existing contract. The Board stated:

“However, any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose of designating a bargaining representative to negotiate a new agreement to become effective upon the *expiration* of the existing contract.” (*Matter of Bercut-Richards Packing Co.*, et al., 64 N.L.R.B. 133.)

Hence the Board, following its own rule as to duty to bargain, instructed the employer to abide by its contract and to enforce and recognize it during the pendency of the proceedings. Now the Board reverses its position and holds the employer should *not bargain* during such proceedings with the union, with which it had entered into the contract. Is, then, the employer under a duty to bargain with the incumbent union or isn't it?

If the employer had failed to bargain with the incumbent union or recognize the contract during the period prior to March 1, 1946, the Board would have held it violated the Act. How does the continuation of that recognition now become a violation of the Act? The so-called

discrimination in favor of the incumbent union, which allegedly constitutes the vice of the employer's action, operated just as effectively prior to March first as subsequent to it.

The Board's answer (Brief, p. 30) is:

"In the first place the Board, in its Supplemental Decision and Order of February 15, 1946, clarified the language quoted above by stating that any closed-shop features of the old contract could not be enforced as against those who supported the rival union in the election".

Yet the contract, extended during the interim period, was not to be enforced as against those who *supported* the rival union in the election. No one contends that AFL could invoke sanctions against those who voted for or were active on behalf of or supported the rival union.

The Board says:

"Secondly, the Board noted (R. 58-59) that the old contract would come to a close in a relatively short time, during which few persons would be employed by reason of the supervening slack season." (Brief, p. 30.)

The nature of the alleged discrimination, however, does not vary because of the extent of its visitation. The charged violation of the Act can hardly be exonerated because it is short-lived. Nor because during the period of the violation "few persons would be employed", and therefore affected by it. Does the Act operate quantitatively; only if a certain number of employees, subsequently determined by the Board, suffer discrimination? Moreover the "few persons", employed in the "off

season" actually constitute in number for the C. P. & G. unit, according to the Board's own official statement in the decision, direction of elections and order of October 12, 1945 (R. 32), four to five thousand employees, and it would seem that these "few employees" cannot be so cavalierly discounted.

The Board's final contention that the employees would be less affected by continued recognition of the old contract than by an extension of its terms is equally speculative. The Board argues the employees "were aware" of the existence of the old contract.

"They could, therefore, go into the election with a *free choice of alternatives*, knowing that their employer was not favoring the A.F.L. by merely permitting the contract to run out its term." (Brief, p. 30.)

But how did the extension of the extant conditions obliterate the "free choice of alternatives"? That choice remained. Nor would the extension of effective and existing conditions show "favoritism" for AFL any more or less than enforcement of those conditions, *required by the Board's own order*, during the term of the contract.

The Board's recognition of the Act's precept as to duty to bargain, through sanctioning performance of the existing closed shop contract, during the pendency of representation proceedings, is squarely inconsistent with its present condemnation of the continued recognition of that duty through extension of the extant conditions of the contract during such proceedings.

We submit in conclusion of this phase of the matter that the Board twice contradicts itself. In the first in-

stance three Board cases, supplemental to the present one, have repudiated the cease-bargaining theory. In the second place, in the instant case, the Board has ordered the employer not to stop bargaining but to continue bargaining with the incumbent union until the "existing contract" expires. These recessions from the original doctrine prove the Board itself recognizes the danger of prohibiting collective bargaining during representation proceedings, and as a consequence is in the process of repudiating the theory it would ask this Court to apply.

We now point out that the Courts have likewise rejected the doctrine.

C. THE BOARD'S NULLIFICATION OF A RECOGNIZED UNION'S EXCLUSIVE RIGHT TO BARGAIN WITH THE EMPLOYER AFTER THE CHALLENGE OF A RIVAL UNION CONFLICTS WITH THE DECISION OF THE COURTS.

The Board and the Courts have consistently and universally recognized that the National Labor Relations Act requires the employer to bargain with the representative of the majority of his employees.

The obligation is not contingent upon a certification; indeed, the Board requires the employer to recognize the majority agency upon a showing of such representation in the absence of formal determination.¹³

Once the employer recognizes the majority representation of the union, its status is presumed to continue, and

¹³*N.L.R.B. v. Clinton Woolen Mfg. Co.*, 141 F. (2d) 753 (C.C.A. 6th, 1944); *N.L.R.B. v. Hollywood-Maxwell Co.*, 126 F. (2d) 815 (C.C.A. 9th, 1942); *Foote Bros. Gear & Mach. Corp. v. N.L.R.B.*, 114 F. (2d) 611 (C.C.A. 7th, 1941); *N.L.R.B. v. Remington Rand*, 94 F. (2d) 862 (C.C.A. 2d, 1938).

the obligation of the employer to bargain likewise continues. Even the employer's personal belief that the union has lost the support of the majority of the employees does not relieve him of the obligation to bargain with the recognized union. The sole lawful basis for refusal to deal is the certification of another union issued by the Board after it has found through its own instrumentality of election that another union has won a majority.

Thus, in *N.L.R.B. v. Whittier Mills Co., etc.*, 111 Fed. (2d) 474 (C.C.A. 5th, 1940), the Board had certified the Textile Workers Organizing Committee in November, 1937. The company, in defense of a charge of refusal to bargain in 1939, claimed that the union had lost its majority. The Court upheld the Board's charge of unfair labor practice saying:

"The statute does not say how long a certificate of representation shall stand good. It is not intended to be ephemeral, nor should it be perpetual. On general principles, since it ascertains a status as existing, *the presumption is that the status continues* until shown to have ceased. The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered."

Likewise, in *National Labor Relations Board v. Piqua Munising Wood Products Company*, 109 Fed. (2d) 552 (C.C.A. 6th, 1940), the Court recognized the well-established rule that a majority once established is presumed to continue until the contrary is shown. In this connection the Court said:

"Respondent's contention that some of the cards lack probative value because dated in 1935 and 1936

is without merit. It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter. *National Labor Relations Board v. National Motor Bearing Co.*, 9 Cir., 105 F. (2d) 652.”

Many Circuit Court decisions confirm this generally recognized rule;¹⁴ indeed, it is announced by the Supreme Court in *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 64 S. Ct. 830 (1944). There the employees had designated a collective bargaining representative but shortly thereafter, and before any agreement had been reached between the representative and the employer, a majority of the individual employees in the unit, without revoking the designation of the union as their representative, requested the employer to bargain directly with them as a group. The Board and the Court, Justice Rutledge dissenting, found that the employer’s acquiescence in this request constituted a refusal to bargain. The Court ruled the obligation of the employer to bargain with the union continued despite the claim upon the employer of the alleged majority to deal with them directly.

The Supreme Court has further held the presumption of continuing representation will withstand a petition of a majority of the employees that they desire to revoke

¹⁴*N.L.R.B. v. Appalachian Electric Power Co.*, 140 F. (2d) 217 (C.C.A. 4th, 1944); *N.L.R.B. v. Botany Worsted Mills*, 133 F. (2d) 876 (C.C.A. 3rd, 1943), cert. denied 63 S. Ct. 1164 (1943); *N.L.R.B. v. Federbush Company*, 121 F. (2d) 954 (C.C.A. 2nd, 1941).

the authorization of the agency. In an opinion ultimately upheld by the Supreme Court, the Board points out that the "advantages" of stability in bargaining relations required it to uphold the representation of the incumbent union despite the petition of the majority which would revoke it. Thus in *National Labor Relations Board v. Century Oxford Manufacturing Corporation*, 140 F. (2d) 541, cert. denied, 323 U. S. 714, 65 S. Ct. 40 (1940) the Board said:

"Problems arising from alleged shifts of allegiance following Board elections are among the most difficult with which this Board is confronted. In considering such allegations, the Board must balance the advantages of stability in collective bargaining against the desirability of affording employees full freedom of choice of representatives. The Board has attempted to achieve a balance between these conflicting policies by refusing to entertain representation petitions within a reasonable period after an election, except where unusual circumstances intervene. Without such a rule, collective bargaining would be deprived of stability, and administrative determinations would become ephemeral. In a case such as this, where no such unusual circumstances are present, no reasonable doubt can be entertained concerning the continued efficacy of a certification."¹⁵

While the petition of a majority of its employees filed with the employer is not sufficient, according to the Board, to rebut the presumption of continuity of representation of the incumbent union, the petition of 30% of the workers filed with the Board succeeds in doing so. If, however, the majority of the employees do not rebut the presump-

¹⁵47 N.L.R.B. 835 at 846 (1943).

tion of continued representation by filing a petition with an employer the minority petition before the Board should be no more effective.

We submit that the cases uniformly hold that once an employer recognizes a bargaining agency as the representative of the workers, the right of that union to representation is presumed to continue. The right withstands representations or claims made by employees that they would prefer another union.

The Board has likewise held that the right of representation withstands ineffective proceedings before the National Labor Relations Board. Thus in the matter of *Grieder Machine Tool and Die Company*, 49 N.L.R.B., 1325, enforced in *N.L.R.B. v. Grieder Machine Tool and Die Company* (C.C.A. 6th, 1944), 142 F. (2d) 163; cert. denied 323 U. S. 724, 65 S. Ct. 56 (1944), the Board held that, in a case in which it refused to issue a notice of hearing upon the rival's petition, the employer was still obligated to deal with the incumbent union despite the petition.

The rule has a particular applicability to the present case. As we have pointed out *supra*, the Board dismissed the representation proceedings initiated by FTA-CIO in the instant case because that union did not comply with the Labor Management Relations Act of 1947. Since the entire representation proceedings have thus been dismissed and dissolved, the parties must revert to the *status quo* which prevailed prior to the institution of the matter. The dismissed petition in the instant cases is in the same position as the dismissed petition in the *Grieder* case. In that situation the Board held the abortive pro-

ceedings did not excuse the employer from bargaining with the incumbent union; in the instant case the dissolved proceedings could not make it unlawful for the employer to continue to bargain with the established union.

It seems obvious that the filing of abortive or invalid petitions cannot change the relationship of the parties. The proceedings are dismissed as of the date that they commenced. The Board must leave the parties as it finds them; it cannot create rights in non-complying or non-representative unions by reason of the filing of void petitions.

Any other determination of this matter in the instant case would place a premium upon petitions filed by non-complying labor organizations. Under the Board's *Midwest* doctrine, non-complying unions would be able to halt the bargaining of the complying, incumbent organization by the act of starting representation proceedings. Non-complying organizations through filing successive petitions could thereby arrest the process of bargaining by complying organizations in perpetuity. Certainly the Act does not intend to grant so drastic a power to a non-complying labor organization.

It therefore must follow that in the instant case the dismissed petition of the non-complying labor organization does not affect the rights of the incumbent union and the employer. With the dismissal of the petition the parties revert to the *status quo*. The presumption that the recognized agency continues to represent the majority applies; the sole attack upon the right of representation falls in the dismissed proceedings.

Even in cases in which the concurrent representation proceedings have not been dismissed the Courts have held the rights of incumbent unions do not terminate until a new bargaining agency is actually certified. We shall point out that the Board's contrary position finds no support in the cases.

1. The Courts do not support the Board's doctrine.

The Board contends that the filing of the petition for certification by FTA-CIO, which consummated in two abortive elections, invalidates the continuation of the incumbent AFL's bargain rights during the interval of these proceedings.

While the Board has amassed a plethora of cases on general propositions, rather than on this specific one, we do not intend to pad this brief with decisions which are not on the issue. There are really no decisions of the Courts which uphold this attempt of the Board at administrative legislation. There are, however, decisions which hold the opposite.

We submit that this Circuit Court of Appeals has twice decided this issue adverse to the Board's contention. In the first instance, this Honorable Court rejected the Board's present contention in its decision in *National Labor Relations Board v. Bercut-Richards Packing Co.*, No. 9499, which involved the same facts as we probe here. In the second instance we submit this Court in another decision, as well as other Circuits and the Supreme Court in cases involving the present issue, refused to follow the Board's cease-bargaining theory.

- a. This Honorable Court in its recent decision in *National Labor Relations Board v. Bercut-Richards Packing Co.*, No. 9499, rejected the Board's contention that the pendency of representation proceedings prevented the continuance of bargaining relations.

As the Board has noted, the instant case is part of the so-called Bercut-Richards proceedings.¹⁶ This Court has had occasion to pass upon the present plea of the Board in the Bercut-Richards litigation, and it rejected that contention.

That litigation¹⁷ emanated from an attempt of the Board to claim a contempt on the part of the employer association (C. P. & G.) of the previous decree¹⁸ of this Court, which in substance forbade a violation of the National Labor Relations Act. The Board contended in that case, as it does here, that the continued exclusive recognition of AFL during the pendency of representation proceedings, and the extension of existent contractual provisions, violated the decree and the Act.

In return to the Rule to Show Cause¹⁹ the employers and AFL admitted the existence of the challenged con-

¹⁶"During July, August and September, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers, including respondent, were represented, were held on these petitions in what has come to be known as the Bercut-Richards Case (R. 22-23, 126; Matter of Bercut-Richards Packing Co., et al., 64 N.L.R.B. 133)," Board's Brief, p. 3.

¹⁷*National Labor Relations Board v. Bercut-Richards Packing Co.*, No. 9499 in the United States Circuit Court of Appeals for the Ninth Circuit.

¹⁸The decree was made and entered by this Court on July 15, 1940.

¹⁹The Rule to Show Cause directed to the respondents, required them to file an answer to the Board's petition "specifically admitting, denying, or meeting by an affirmative defense, every material allegation of the said petition, setting forth in short and plain terms each and every defense, including the material matters of time and place."

tract and defended its legality. Joining issue, the Board vigorously contended the contrary, and this point was argued on the merits orally by all parties and briefed by the employers and the AFL.

When this Court denied the petition to adjudge the employers in contempt, without written opinion, the Board realized that unless the decision could be confined to a procedural ruling, further proceedings in that case would be barred. Hence on July 23, 1946, the Board filed its application for clarification of the decision. This Court denied the application.

Since the decision of this Court was not without prejudice, and since this Court refused upon the Board's subsequent application to restrict it to a procedural ruling, this Court, it must be presumed, decided the matter upon the merits.

The commentators²⁰ and the Courts agree that a decision of a Court having jurisdiction constitutes a decision on the merits and is *res adjudicata* of the issue unless otherwise specified.

The applicable Federal Rules of Civil Procedure articulate the general rule.²¹ Rule 41b provides—

“*Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these

²⁰See Freeman on Judgments, Sees. 626, 633, 641, 684, 687, 708.

²¹The rules of the Ninth Circuit provide as to enforcement of Board orders: “Excepting as above set forth the rules governing appeals shall apply, after the filing of the record.” As to appeals the rules expressly provide: “The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this Court with respect to appeals in actions of a civil nature.”

rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.*''

The dismissal in the *Bercut* case could not have been for lack of jurisdiction, since this Court took jurisdiction; and, of course, there was not the slightest suggestion by any party of an improper venue.

The Supreme Court of the United States has itself declared that a decree, such as this, which is on its face absolute, "goes to the merits." In *Lyon v. Perin and Gaff Manufacturing Co.*, 125 U. S. 698, 31 L. Ed. 839 (1888) a decree of dismissal was entered upon complainant's default and failure to appear. To the contention that the dismissal did not bar a subsequent proceeding, the Court answered:

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy,

and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant v. Essex Company*, 74 U. S. 7 Wall. 107, 109 (19:154, 156): 'A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complaint has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.' '' (p. 702.)

More recently the Supreme Court reiterated the rule in *Napa Valley Electric Company v. Railroad Commission*, 251 U. S. 366, 64 L. Ed. 310 (1920). In this case it was urged as a defense that the California Supreme Court had dismissed without opinion a prior petition of the Electric Company to review a decision of the California Railroad Commission.²² Affirming the decision of the District Court, the Supreme Court said,

²²The District Court dismissed the bill and upheld the contention that the prior decision was *res judicata*, stating (257 Fed. 197):

"The contention by plaintiff that the ruling of the state court is not a proper predicate for invoking the doctrine of *res judicata* in that it is not a judgment 'on the merits', but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here * * *; and that being true, the denial of the petition was necessarily a final judicial determination * * * based on the identical rights asserted in this court, and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact * * *" (p. 199.)

“In other words, the substance of the contention is that the court, instead of hearing, refused to hear; instead of adjudicating, refused to adjudicate; and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of *res judicata* assigned to it by the district court.

“Counsel, to sustain the position that he has assumed and contends for, insists upon a literal reading of the statute and a discussion of the elements of *res judicata*. We need not follow counsel into the latter. They are (372) familiar and necessarily cannot be put out of mind, and the insistence upon the literalism of the statute meets in resistance the common, and at times, necessary, practice of courts to determine upon the face of a pleading what action should be taken upon it. * * *

“And (373) we agree with the district court that ‘the denial of the petition was necessarily a final judicial determination, based on the identical rights’ asserted in that court and repeated here. (*Williams v. Bruffy*, 102 U. S. 248, 255, 26 L. ed. 135, 137.) And further, to quote the district court, ‘Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact.’ *Calaf v. Calaf*, 232 U. S. 371, 58 L. ed. 642, 34 Sup. Ct. Rep. 411; *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 299, 61 L. ed. 1148, 1153, 37 Sup. Ct. Rep. 506.

“The court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore the decree of the District Court is affirmed.”

As we have demonstrated above, a dismissal without opinion is presumably an adjudication upon the merits and bars a subsequent proceeding. In view of Rule 41 (b) of the Federal Rules of Civil Procedure that presumption is conclusive and irrebuttable. This Honorable Court's decision, therefore, must compose an adjudication upon the merits of the present issue; it involved exactly the same question as the Board seeks to redetermine in the present proceedings.

- b. The United States Supreme Court, as well as a number of Circuit Courts and State Supreme Courts, have refused to follow the Board's attempted administrative legislation that the pendency of representation proceedings works a cease-bargaining order upon the employer and the incumbent union.

This Honorable Court squarely held the bargaining relationship of the incumbent union and the employer is not quashed by the filing of representation proceedings by a rival union in a case which long predated the *Bercut-Richards* and present litigation.

In *National Labor Relations Board v. Pacific Greyhound Lines, Inc.*, 106 F. (2d) 867 (C.C.A. 9th, 1939), a labor union, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, upon a showing of representation to the employer, entered into a collective bargaining contract with the employer, which, among other matters, provided that either party could terminate it upon sixty (60) days' prior notice to December 31, 1938, or prior to December 31 of any ensuing year. Thereafter a rival union, the Brotherhood of Railroad Trainmen, attempted to organize the employees. On June 7, 1938, Amalgamated filed a petition for certification; on June 10, 1938, the Brotherhood of Railroad Trainmen did

likewise. The Board directed an investigation; from June 23 to 27 it held hearings, and on October 29 issued its decision and direction of elections.

Two days thereafter the Greyhound and Amalgamated modified the existing closed-shop agreement to provide that it could be terminated by Greyhound or the incumbent bargaining agent, the Amalgamated, upon 60 days' written notice by either party at any time, instead of upon sixty (60) days' notice prior to December 31 of the year.

This Court did not support the Board's contention that the modification of the agreement during the pendency of representation proceedings constituted a violation of the Act. This Court said:

"Prior to the elections and on or before October 31, 1938, the closed-shop agreement was modified so that it could be terminated by either Greyhound or the then bargaining agent for the men, Amalgamated, on 60 days' written notice from either party to the other. By thus shortening the time for termination of the agreement, Greyhound and the employees, through the Amalgamated, facilitated the opportunity for a new bargaining agent to terminate the closed-shop agreement if one were selected at the approaching elections.

"We are unable to find in this modification of the agreement any justification for the Board's charge that it constituted a contempt of our decree or any violation of the Act. On the contrary, it seems in aid of the Act's declared purpose of a speedy disposition of labor disputes. *We regard the contract, as modified, then to be binding on the employees and on the company and not affected by the*

fact that undetermined proceedings were pending before the Board. Consolidated Edison v. N.L.R.B., 305 U. S. 197, 237."

The *Greyhound* decision is impressive because there the representation proceedings were actually initiated by the contracting union, while, here, they emanated from the petition of the challenging union only. Despite the dual invocation of the *Greyhound* representation proceedings and despite the fact that the contracting union itself first commenced them, this Court still allowed the contracting union to continue to bargain. That union occupied a weaker position than AFL did here; yet this Court held that its bargaining rights were not affected by the question of representation which it had itself raised.²³

This Circuit Court is not alone in rejecting the Board's thesis that representation proceedings prevent continuity of bargaining relations.

The Fifth Circuit, in the case of *N.L.R.B. v. McGough Bakeries*, 153 Fed. (2d) 420 (C.C.A. 5th, 1946) reached a similar result. In this case the Court considered the validity of a Board order requiring reinstatement of em-

²³We are surprised at the Board's cavalier treatment of the Court's express language in this case. (Board's Brief, p. 19.) The Board claims the ruling rested "on the narrow ground of failure to state facts within the scope of the outstanding decree", but this argument ignores the above quoted language of this Court. That language likewise belies the Board's loose statement: "The question of whether the continued recognition of one of the unions constituted a violation of the Act was, therefore, never decided by this court." (Ibid.) The employer certainly granted the union "continued recognition" when it continued to contract with it. The Board would erase the facts as well as this Court's explicit and succinct ruling.

ployees discharged under a closed-shop contract with an independent union. The company signed the contract two months after the independent union had filed a petition for investigation of representatives, and after the competing CIO union had filed a charge alleging that the independent union was company-dominated. The Board found the independent union to be company-dominated, and ruled the discharges pursuant to the independent union's request to be illegal. The Court, however, held the evidence as to company domination insufficient, and sustained the contract with the independent union, despite the pending proceedings.²⁴

In the case of *Peninsular & Occidental Steamship Co. v. National Labor Relations Board, et al.*, 98 Fed. (2d) 411 (C.C.A. 5th, 1938), cert. den. 305 U. S. 653 (1938) setting aside 6 NLRB 959 (1938), the Circuit Court rejected the Board's contention that the employer violated the Act in that it executed and enforced a union shop contract after it learned of its employees' change in union affiliation and before the National Labor Relations Board determined the question of representation. In this case, the

²⁴The Board's defense to this case is that, although representation proceedings were pending when the parties entered into the contract, "the Board 'did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed * * *'" (Board's Brief, p. 19.) Here FTA-CIO's petition has, in similar fashion, not been acted upon because the Board ruled that the union had not complied with the provisions of the Act. (See p. 7, *supra*.) The petition, here, too, has been treated as lapsed. If the filing of a petition, which is subsequently allowed to lapse, does not defeat the existing bargaining relationship, neither can the filing of the abortive petition of the non-complying FTA-CIO. Moreover, the Board's argument here conflicts with its decision in the *Grieder* case, *supra*, p. 43.

crews of two ships, the *Florida* and the *Cuba*, transferred their membership from the International Seamen's Union to the National Maritime Union. In the words of the Court, "the company had asked the Board to designate the proper bargaining agency at the beginning of the trouble" between the two unions, but, despite the fact that the Board did not make such designation, the company entered into a union shop contract with the International Seamen's Union. When the company discharged employees who refused to conform with the union shop provisions of that contract, the Board proceeded with unfair labor practice charges, following a procedure similar to that invoked here. As the Court said:

"The Board declined to give effect to the existing contract between the company and the International Seamen's Union on the ground that a majority of the crews belonged to the National Maritime Union and the company had made no effort to ascertain the proper bargaining agency before the contract was made." (p. 414.)

Rejecting the Board's position, the Court held:

"The right of an employer to make a contract with a labor union and to require membership therein as a condition of employment is expressly recognized by the Act. 29 USCA par. 158 (3). The contract with the International Seamen's Union was a valid, existing agreement at the time the crews were discharged, and no other bargaining unit had been designated. Under its terms the company was obliged to give its members preference in re-employment." (p. 414.)

Thus two other Circuit Courts have concurred with this Court in its rejection of the Board's position here; likewise, the Court of Appeals of New York has, in a parallel situation under the State Labor Relations Act, refused to follow the State Board in the same particular.²⁵ While the United States Supreme Court has not passed upon the present issue, it has indicated its belief that the Act does not prohibit interim contracts of a limited nature during the pendency of representation proceedings.

In *Consolidated Edison Company, etc., et al. v. National Labor Relations Board*, 305 U. S. 197 (1938), a decision relied upon by this Court in the *Greyhound* case, the Supreme Court upheld contracts of the incumbent union covering its membership despite the Board's contention that they were "invalid because made during the pendency of the proceedings." The proceedings not only involved unfair practice charges against the employer on the ground the incumbent union was company-dominated, but an election to determine the choice of the employees as between the incumbent and a rival union. While the Supreme Court ruled on a different type of contract than

²⁵The Court of Appeals of New York held in *Triboro Coach Corporation v. New York State Labor Relations Board*, 286 N. Y. 314, 36 N. E. (2d) 315 (1941), a case arising under the provisions of the New York State Labor Relations Act:

"It is urged that, since the Board had determined that a controversy existed among the employees as to the appropriate representative to bargain with the employer and had issued an order for an election to determine such controversy prior to the time of the making of the 1939 agreement, Triboro's knowledge of such action by the Board suspends the right of the employer to enter into a contract with the selected representatives of a majority of the employees. *The act does not so provide.*"

is involved here, it faced the same basic question: the propriety of the continuation of contractual relations with an incumbent union during the course of representation proceedings by the Board. The Supreme Court, recognizing the value of contractual relations in preserving industrial peace, upheld the right of the employer and the incumbent union to continue their relationship. The Court held that any discrimination of the employer resulting from his continuing to contract with the incumbent union did not impede the democratic processes of the Act.²⁶

The general philosophy of the Supreme Court therefore seems to recognize the desirability of settled contractual relationships as against the plea that such contracts may impair fluidity of choice in the selection of a bargaining agency. It has held that pending proceedings do not necessarily halt collective bargaining.

²⁶“The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. The 80 per cent of the employees who were members of the Brotherhood and its local, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining * * * *Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice * * ** They contain no terms which can be said to ‘affect commerce’ in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.” (p. 236.)

As we have pointed out *supra*, this concept has been applied by a number of Courts to the specific situation here involved. We shall point out that the Board fails to submit any contrary decisions that specifically support it.

2. The cases cited by the Board do not support its doctrine.

We now briefly analyze the decisions cited by the Board.

The Board begins by setting out the cases on page 9 of its brief to sustain the proposition that in an election, in which a *single* union is seeking the right of representation, "the employer may not become a participant". The Board does not throw any light upon the present issue by amassing cases to illustrate this legal platitude. The Board continues to "prove" the obvious by arraying seven more decisions for the proposition that in a *multiple* contest of unions for representation, "the employer may not enter the race" (Board's Brief, p. 10) by according special advantages to any union. The question here is whether the observation of the *status quo* by the employer, the continued recognition of the existing bargaining agency and the extension of the contractual conditions, accords special advantages to the incumbent, or whether the destruction of the *status quo* by the reversal of the existent situation would not accord special advantages to the challenger.

The general propositions and cases cited by the Board do not even purport to answer this question.

The Board now (p. 12) advances to the defense of its finding that respondents unlawfully aided the AFL by continuing to recognize it during the pendency of pro-

ceedings. The Board particularly contends the "advantage of a closed shop" renders "well-nigh impossible" a free election, overlooking the fact that the Board in ordering the first election during the course of a closed shop contract found nothing "impossible" about it.

According to the Board's present-day notion of the matter, "The status of exclusive bargaining representative affords a union the unique prestige of speaking to the employer in behalf of all employees in the union" and the Board cites two Supreme Court cases for that proposition, *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332 and *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192.

In the first case, the Supreme Court held that *individual* labor contracts, negotiated by the company and its workers, could not serve as an excuse for the company to refuse to bargain collectively with the designated agency. But the Court does not even remotely by decision or *dicta* sustain the Board's cease-bargaining contention here.

The Court, however, does indicate that if the mechanism prescribed by the Act fails in some manner to designate the majority representative, the employer is free to deal with his workers collectively or individually, as he pleases.

"The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost

without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.” (p. 337.)

If anything, the language of the Court indicates that if the bargaining agency is “not demonstrable by the rules prescribed by the statute” or the “new majority representative” has not been designated, the employer is completely free, even to enter into individual contracts. It would follow that he was free likewise to enter into a combination of individual contracts or a collective contract. Thus, if anything, the case supports our position here rather than the Board’s, which attempts to spell out a prohibition of the employer’s freedom to act under the specified circumstances.

The second case, cited by the Board, a very well-known decision, holds that a collective bargaining representative under the Railway Labor Act undertakes the obligation of representing all employees without discrimination. The case throws no light upon the present issue.

The Board next contends that the workers “will naturally prefer an organization with which his employer has already demonstrated a willingness to deal.” (Brief, p. 13.) This supposed attraction is speculative, as we have pointed out. (See Sec. 5, A, IV.) Moreover, if the concept is true, the fact that the employer *has* been willing to deal with the incumbent composes an historical fact that even the Board cannot erase.

While the Board claims the Supreme Court early recognized that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees" (*N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, cited Board's Brief, p. 13), the decision does not advance the Board's position. In the *Pennsylvania Greyhound* case, the company had sponsored and recognized a *company dominated union*, and the Court sustained the Board's finding of an unfair labor practice. No contention is made in our case that the AFL was company dominated.

Moreover, the "marked advantage", mentioned by the Court, which the union obtains by recognition, was granted by the Board in its Second Direction of Elections to the rival FTA-CIO. The Board ordered the employer to confer recognition on a challenging union which had made no showing that it represented a majority of the employees. For the employer to confer recognition on such an organization would indeed afford it a "marked advantage" over the AFL in any future election. Yet the Board, here, *gave* it to the challenger.

The language of the Supreme Court confirms our contention that the Board's attempt to force the employer to confer recognition on the challenging organization through dealing with it on an equal basis with the incumbent donates to the challenger a distinct advantage. The Board would in effect permit the challenging organization to divert a confirmed recognition from an incumbent to itself.

The Board cites a number of cases to the effect that the grant of exclusive recognition by an employer, at a time when the majority status of the union is in doubt, constitutes unlawful assistance to the union. The Board cites here, as well as elsewhere in its brief, cases that hold an employer commits an unlawful labor practice when he contracts with a company-dominated or company-assisted union. Since these acts of assistance are in themselves unfair labor practices, these decisions do not make out the Board's case.

Thus in *International Association of Machinists v. N.L.R.B.*, 311 U. S. 72 (1940), the Supreme Court held that the International Association of Machinists, which had been granted a closed shop contract despite the known claim of another union, was assisted by acts of discrimination, by intimations of the employer's choice of unions, by silent approval of the membership drive of the favored union and by close surveillance of the rival union. These acts constituted unlawful labor practices in themselves and were the basis upon which the Board set aside the closed shop contract. No such unfair practices took place here.

In the second case cited, *N.L.R.B. v. National Motor Bearing Co.*, 105 F. (2d) 652 (C.C.A. 9th, 1939), the employer likewise discriminated against the union, whom it knew to represent a majority of its workers, by closing down the plant rather than negotiate with the bargaining agency. Thereupon the employer entered into a closed shop contract with a rival union. The Court sustained the Board's finding that the employer had discriminated

against the majority representative of the employees and thereby committed an unfair labor practice.

In the case of *N.L.R.B. v. John Engelhorn & Sons*, 134 Fed. (2d) 553 (C.C.A. 3rd, 1943), the case next cited by the Board, the Court holds that the contract of the employer with a contesting labor organization cannot be supported if it runs to a union favored by employer's activities. Before executing the questioned contract, the employer had assisted the union by statements of supervisors to employees indicating preference for it. The Court says:

"The first (proposition) is that the employer may not raise for his protection in this proceeding a closed shop contract made with Local 174 at a time when the employer knew that an investigation and certification proceeding instituted by a rival labor organization, claiming a majority of the employees, was pending. The Board in accordance with its previous decisions, so held. *This proposition of law does not seem to have been squarely decided by any court decision. Nor need we decide it here, for we consider the second line of attack sufficient. We think, as did the Board, that the agreement was invalid in view of the employer's activities attending its execution.*" (p. 555.)

"The case is thus one where the employer negotiates a closed shop contract with a labor organization which he assisted by conduct defined by Act to be an unfair labor practice. Such a contract is invalid under the proviso of par. 8 (3) of the Act." (p. 557.)

In the Board's next case, *N.L.R.B. v. Southern Wood Preserving Co.*, 135 F. (2d) 606 (C.C.A. 5th, 1943), the Board and the Court found that the employer had encouraged one of two rival unions in many ways in addition to signing the contract with the assisted union. We refer to the following language in the Court's decision:

"We think also that the circumstances, especially the discharge of Turner, and the premature signing of a new contract with the Engineers' Union and the unusual facility afforded of shutting down the plant to vote on it, are sufficient to show a support by the employer of that Union as against its rival, contrary to the National Labor Relations Act. Financial support is not the only kind of support forbidden." (p. 607.)

Finally, the Board cites *Elastic Stop Nut Corporation v. N.L.R.B.*, 142 F. (2d) 371 (C.C.A. 8th, 1944). In this case the contract emanated from a labor organization which the Board and the Court found, in the first place, to have been assisted by the employer, and, in the second place, to have had no previous bargaining history with the employer. The Court in that case said:

"The Board inferred from the evidence that the employees did not freely select the Association as their bargaining representative, and that the contract was not a contract negotiated for them by their freely chosen representative. In those circumstances there had been no settling of labor relations; the employees were still attending organizational activities and attempting to decide on their union affiliations. Since recognition was accorded to an 'assisted' union, and the contract entered into with the assisted union, both the recognition and contract may be regarded

as ineffective to settle the collective bargaining matters in issue at petitioner's plant." (p. 378.)

In the instant case there is no contention that AFL had been dominated or assisted by the company. On the other hand, the record showed the employer bargained with AFL for many years previous to the present contract.

N. L. R. B. v. Waterman Steamship Corp., 309 U.S. 206, cited on page 16 of the Board's brief is another case in which discrimination and assistance, independent of the contract of the incumbent union, composed a direct violation of the Act. As the Court points out, the Board charged the company "had been guilty of a most flagrant mass discrimination against its employees" (p. 208) in violation of the Act, in that the employer discharged the entire crews of vessels "because of the crew's C.I.O. affiliation". The Court sustains the Board's finding of discrimination on this ground. That, in itself, is a complete distinction between the *Waterman* case and ours.

The Board (Brief, p. 17) alludes to a further finding of the Court as to discrimination, failing to quote the entire sentence of the Court, which reads as follows:

"Enough has been shown to establish the reasons for the Board's decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C.I.O. and the A.F. of L." (p. 226.)

The Court refers to the refusal of the company to issue passes to C.I.O. representatives, although that privilege was afforded to A.F.L. representatives. Obviously the

isolation of crews on vessels from normal contacts emphasizes the effect which any unilateral privilege of access would have upon them. In our case, instead of finding such discrimination, the Board concluded that the C.I.O. had no ground for complaint on this score. Hence, the powerful and determinative discrimination of the *Waterman* case does not occur here. That factor is a second distinction between the *Waterman* case and the instant one.

The Board cites (Brief, p. 21) *Local 2280 v. N.L.R.B.*, 158 F. (2d) 365 (C.C.A. 9th, 1946), a decision of this Court, for the proposition that the continuance of the closed shop provision of the involved contract would permit the "A.F.L. (to) pick and choose the electorate in the forthcoming election by preventing the employment of its opponents * * *" (Brief, p. 20), But the Board grossly misreads the cited case, since it holds only that the closed shop contract may not be used to effect the discharge of those who electioneer for the challenging union.

The Court recognizes that "Such (closed shop) contracts are generally drawn, as here, in the anticipation that *during their currency there will be elections * * **". (p. 368). The employee "otherwise complying with the (contracting) union's membership requirements" (p. 369) is entitled to protection from discharge for expressing his choice. "Employers may well be perplexed by borderline cases of fact as to whether their employees' dismissals from a closed shop union are for such electioneering for a rival union or for some of many other union reasons warranting their dismissal". (p. 369.) The Court thus

clearly confines its decision to a discharge of an employee under a closed shop contract for his activities on behalf of the rival union. The decision does not hold, but impliedly denies, that the closed shop contract in itself prevents a freedom of choice by the employees.

Indeed, in the light of the Board's contention that a closed shop contract permits the contracting union to "pick and choose" the electorate, the following statement of this Court is significant.

"In many closed shop elections as much as forty percent of the voters vote for a union of which they are not members 'for the purpose of taking the collective bargaining rights away from' the union which the closed shop agreement compelled them to join." (p. 369.)

The Board's argument, here, obviously fails because, so long as the rule of this Court's decision in the *Local 2280* case, is observed, and employers are not discharged for their activities on behalf of the challenging union, there is nothing to prevent them from voting down the union in which they hold membership by reason of the closed shop.

N.L.R.B. v. American White Cross Laboratories, 160 F. (2d) 75 (CCA 2nd, 1947) cited by the Board (Brief, p. 21) follows and cites the above decision of this Honorable Court.

The Board's citations conclude (p. 21) with a list of Board decisions following its case of *Matter of Midwest Piping & Supply Co., Inc.*, 63 N.L.R.B. 1060. Upon that decision the Board's present case rests; yet, it, too, is distinguishable from the present facts. In the *Midwest*

Piping & Supply Co. case there had been no previous contractual relationship such as in the instant one. A "members-only" contract with the Steamfitters had expired almost a year before the assailed contract was consummated. In the instant case, the contractual relationship between the parties continued; the chain of contractual relationship remained unbroken. Such was not the case in the *Midwest Piping & Supply Co.* case.

We submit in conclusion of this analysis of the Board's cases, that the cited decisions do not support the *Midwest* doctrine. The Board has presented a quantitative analysis, collecting large numbers of cases to support generalized propositions, but it has not cited a single decision of the Courts supporting its contention that an employer must cease dealing with a recognized union when a rival organization files a petition for certification.

V. CONCLUSION.

The Board's petition in this case rests upon a doctrine which must, as it did here, result in a breakdown of collective bargaining for a long and indefinite period. To hold that a rival union can halt long-continued bargaining by an incumbent union and an employer by the mere act of making a claim for representation is to disrupt stable relations and to invite jurisdictional strife.

The Board's theory that collective bargaining can stop is academic. Labor relations are a condition precedent to conducting any business. The Board's attempted three year hiatus of bargaining in the instant case exposed one of the Nation's leading industries to possible collapse.

No Court has ever supported this extreme and unrealistic doctrine of the Board. Recent cases of the Board show that it, too, is questioning the position it originally took here.

We submit that the relevant decisions and the underlying postulates for industrial peace require the dismissal of the petition.

Dated, San Francisco,

June 28, 1948.

Respectfully submitted,

TOBRINER & LAZARUS,

Attorneys for Intervenors.

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No. 11,449

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
VS.	
FLOTILL PRODUCTS, INC.,	}
<i>Respondent.</i>	

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR THE RESPONDENT FLOTILL PRODUCTS, INC.

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FILED

JUL 14 1948

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BRIEF FOR THE RESPONDENT FLOTILL PRODUCTS, INC.

I.

THE ISSUE.

The sole issue before this Court may be briefly stated as follows:

Where for 5 years an employer has had a closed-shop contract with the AFL, does the reaffirmation of the contract become a violation of Section 8(1) of the National Labor Relations Act merely because of the pendency before the Board of an unresolved question of representation?

II.

STATEMENT OF FACTS.

The Board on pages 2 to 7 of its brief, has set out a brief statement of what it calls "relevant and undisputed facts". The Board's statement of facts is misleading, particularly in omitting the crucial fact that for at least 5 years the respondent and the AFL had been parties to a *closed-shop contract* and that the contract attacked in these proceedings was merely an extension or reaffirmation of that contract. Respondent feels it necessary therefore to summarize the significant facts.

1. Origin of Bargaining Relationship.

The case presented to this Court is but one segment of a rather large picture of internecine labor strife that has plagued the California canning industry since 1938. See, for example, *Matter of Bercut-Richards Packing Co.* (1939), 13 N.L.R.B. 101, (1940) 22 N.L.R.B. 250; *National Labor Relations Board v. Bercut-Richards Packing Co.*, C.C.A. 9th, number 9499. Flotill Products, Inc., in its Stockton operation, first appeared as a part of this unhappy scene in 1939, when it entered into its first collective bargaining agreement with a labor organization affiliated with the American Federation of Labor. (R. 267.)

Flotill negotiated its first collective bargaining agreement with an AFL union in 1939, probably in March. (R. 267, 311.) The local union was Federal Local 20676, directly affiliated with the AFL. (R. 311.) This contract by its terms ran until March 1

of the following year, but was self-renewing unless 30 days' previous notice was given. (R. 275-6.)

2. Subsequent Bargaining History.

The practice of respondent was to execute a written stipulation adopting the master agreement established for the major part of the California canning industry by California Processors and Growers, Inc., on the one hand, and the California State Council of Cannery Workers on the other. (R. 304, 312.) Inasmuch as the master contract did not cover the full agreement with Local 20676 a separate contract was executed in July or August of 1941. (R. 312.) This supplement provided that all employees had to join and be members of the union before they went to work, and, further, that they had to remain members of the union as long as the contract remained in effect. This, too, was automatically renewed in the absence of a 30 day notice prior to March 1. (R. 313.) The supplement also provided that membership dues and initiation fees were deductible from wages and were to be paid by the Company to the union. (R. 276.) Neither the Company nor the union ever gave the required notice to terminate the arrangement under the master contract. (R. 276.) Because of an amendment to the master contract respondent and Local 20676 renewed their stipulation accepting the C.P. & G. "green book" agreement in March, 1943. (R. 312.) Throughout the year 1945, then, and until March, 1946, there were two documents embodying the contractual responsibilities of the Company and the AFL Local union; first, the stipulation of March

1943, adopting the C.P. & G. "green book" master contract, insofar as it was applicable; and second, the supplemental memorandum of July or August, 1941, which established a closed shop and check-off of union dues and assessments. (R. 311.)

In May and June of 1945, respondent received various written communications from the AFL advising that jurisdiction over the employees had been transferred to Local 601 of the Teamsters Union. (R. 278-9.)

About September 15, 1945, shortly after a meeting of the employees held at the Company cafeteria, two representatives of the local union, Mr. Brissey and Mr. Moeck, called on Mr. Arthur Heiser, respondent's Personnel Director and Assistant Secretary, and informed him that the membership of Local 20676 had voted unanimously to transfer to Local 601 of the International Brotherhood of Teamsters. (R. 279-80; 290-91; 294; 301-2.) Thereupon respondent addressed a letter to Local 601 recognizing that it was taking over the contract of Local 20676 (R. 284, 288) and thereafter respondent recognized Local 601 and the contract to the same extent as it had previously recognized the old local. (R. 284.)

3. Board Proceedings.

On July 3, 1945, a Petition for Certification of Representatives was filed by an organization designated as "Cannery and Food Process Workers", which purported to be affiliated with the "Cannery and Food Process Council of the Pacific Coast". (R.

509-10.) This Petition was filed with the Board's Twentieth Region in case number 20-R-1429. In addition to the petitioner group, "Cannery Workers Union Local 20676 and/or International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen" are listed as claiming to represent the employees at respondent's plant.

Following conclusion of a hearing the Board directed that an election be held among respondent's employees by telegraphic order of October 5, 1945. A formal written decision issued on October 12, 1945 (R. 48), and an election was held at respondent's Stockton plant on October 15, 1945. (R. 325.) Results of the balloting were as follows (R. 89):

Approximate number of eligible voters	305
Valid votes counted	205
Votes cast for AFL	105
Votes cast for CIO	100
Votes cast for Independent	0
Votes cast against participating labor organizations	0
Challenged ballots	20
Void ballots	7

Objections to the election were filed by the AFL, and on February 15, 1946, the Board vacated and set aside the election at respondent's plant, along with all others similarly held, because of substantial possibilities of error arising out of its directives for the holding of the elections.

4. The 1946 Contract.

On March 5, 1946, respondent executed a memorandum agreement with California State Council of Cannery Unions, AFL, and Cannery Workers' Union, Local 601, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL, the substantive provisions of which are as follows (R. 128-9):

1. It shall be a condition of employment with the employer that all employees covered by this agreement shall become and remain members of the Union in good standing. Present employees who are not as of the date of this agreement members of the Union must become members within ten (10) days from the date hereof. Any new employees shall be required within ten (10) days of the date of hiring to become a member in good standing.

Persons who fail to maintain good standing in the Union in accordance with the By-Laws thereof shall be discharged within thirty-six (36) hours after the company is so notified by the Union.

In the hiring of additional employees, the employer shall give preference to unemployed members of the local Union provided such individuals have the necessary qualifications and are available within forty-eight (48) hours after being notified. As a basis for preferential consideration unemployed members of the local Union shall be required to present a clearance card from the local Union, evidencing the fact of their paid-up membership.

2. Any adjustment in wages, hours, or conditions, which may hereafter be agreed upon by the parties, shall be effective as of March 1, 1946, and retroactive to that date.

Both the Trial Examiner and the Board which approved his findings, expressly found that prior to the time the contract of March 5, 1946, was signed the respondent and the AFL had been parties to a closed-shop contract. The Trial Examiner (R. 94-95) concluded:

“The Board alleged that respondent violated Section 7 of the Act by discharging Sandrio on November 17 or 18, 1945. Respondent averred he was discharged on request of the AFL for not being in good standing in that union and thus pursuant to their closed-shop contract which provided that employees had to join the AFL and remain members thereof. There was testimony that such a contract was in effect *which the undersigned credits*. The Board decision in the Bercut-Richards case which was issued February 15, 1946, stated, ‘Moreover, no requests for discharges resulting from activity in the election are justified even under the present (closed-shop) agreements.’ This decision did not issue until months after Sandrio’s discharge but the case law upon which that statement was based is well established. However, there is no showing that Sandrio was active in or even participated in the election, while the record clearly shows that on a statement by the AFL that he was not in good standing with them, respondent discharged him pursuant to their contract and the undersigned so finds.”

The Board (R. 75) adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions and modifications. The Board did not modify the Trial Examiner's finding of a prior closed-shop contract and therefore adopted that finding.

It is plain, therefore, that the inference in the Board's brief that the respondent had granted a new closed-shop contract to the AFL is contrary to the fact. In at least one place in its brief (Board brief, page 30) the brief incorrectly states "that the employer had gone beyond the requirements of the old agreement." This statement is incorrect.

The Board found that merely because respondent continued to contract with the AFL, it had interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act. The Board ordered respondent to cease and desist (1) recognizing the AFL as the collective bargaining agent of its employees, (2) giving effect to its contract with the AFL, and (3) in any like or related manner interfering with, restraining or coercing its employees; to withdraw and withhold recognition from the AFL unless and until it should be certified, and to post notices to its employees. All of this is directed on the theory that such an order is necessary in order to protect the right of respondent's employees to be represented by a union of their own choice. Respondent's employees had freely selected the AFL as their bargaining agent, had been represented by the AFL

for approximately 7 years and had never repudiated that choice.

To repeat then, the sole issue before this Court is as follows:

Whether respondent was forbidden by law to extend its collective bargaining relationship with the AFL, including the closed-shop which had existed for a period of 5 years, during the pendency of a question concerning representation. The contract of March 5, 1946, merely reaffirmed and extended an existing relationship. The Board argues that the law required respondent to abandon the existing relationship. The respondent argues that it was permitted, if not required, to maintain the status quo unless and until the Board had designated a new bargaining representative.

III.

THE BOARD'S "CEASE BARGAINING" DOCTRINE IS NEITHER REQUIRED NOR PERMITTED UNDER THE ACT.

A. PRACTICAL RESULTS OF "CEASE BARGAINING" DOCTRINE.

Before we turn to the legal foundation for our contention that the Board's order here is against law, let us see how it works in practice.

We have here a case where an employer dealt with an AFL union on an exclusive basis from the inception of their bargaining relationship in 1939. Since 1941, the employer had granted to this union both a

closed shop and a dues check-off (R. 274-276, 311-313). In the sense that these contractual conditions eliminated the necessity of membership solicitation by the AFL, the collective bargaining relationship was self-policing for a period of years. It remained unchanged until May or June of 1945 (R. 278-279) when respondent learned of a change in the organizational affiliation of the contracting local union. Soon thereafter, on July 3, 1945, a petition for certification of representatives was filed by an independent labor organization designated as the Cannery and Food Process Workers of the Stockton area (R. 509-10; the Board is in error when it states at page 3 of its Brief that the petition was filed by the CIO), and from that point, as far as respondent is concerned, the trouble started. Following a hearing in which a number of similar proceedings were consolidated, the Board, on October 5, 1945, directed an election. (64 N. L. R. B. 133.) Although the earliest date on which unilateral termination of the contract could have been effected was March 1, 1946, the Board at that time saw no reason to disturb the contractual relationship between respondent and the AFL in any respect whatsoever. And had the Board been able to set up and conduct a fair and proper election the issues now before this Court would not have been created, nor would the illogic of the Board's position be so convincingly demonstrated. The AFL union received at least a plurality of the valid votes cast, but because of "such a possibility of error" through defects in the Board's Direction of Election the entire election was

vacated and set aside on February 15, 1946. (65 N.L.R.B. 1052, 1058.)

This left respondent in the unhappy position of having an outstanding collective bargaining agreement (which earlier could have been terminated by appropriate notice, effective March 1, 1946) with the AFL, of having the election issue still unresolved by the Board, and of having its 1946 operating season only a matter of days ahead. If we correctly understand the Board's position, the Board would have compelled respondent to take either of two courses: one, terminate its contract unilaterally on March 1, in a manner not contemplated by the contract, and refuse to deal with any union until the Board unsnarled its tangle; or, two, terminate at least the preferential features of its AFL contract, and treat with all comers upon identical terms. To terminate the contract would have constituted a complete and effective denial to respondent's employees of their rights, under the Act, to bargain collectively. To deal with all unions would have created the inconceivable condition of having several bitterly contesting groups claiming to represent employees, each striving to obtain an advantage from respondent and each striving to outdo the other, but with none entitled to secure a single benefit to the exclusion of the other. This course also would have had the effect of automatically placing the CIO (an organization which, incidentally, had not even initiated the representation proceeding and which had made no claim to speak for any of respondent's employees as late as July 3, 1945) on a full

parity with the AFL which had maintained an exclusive contractual status in the plant for six years.

The only realistically neutral position for respondent to take, then, was to maintain the status quo until such time as the Board with due deliberation should determine that a different representative should speak for the employees. This position it took, and the record shows without contradiction that neither by act nor by contract did respondent confer additional recognition or extend new privileges to the AFL. Respondent left the contesting unions as it found them; to have done otherwise would have been to establish for the CIO a status to which it could lay no claim save through the mechanical act of participating in someone else's (the Independent Cannery and Food Process Workers Union) representation proceeding.

The propriety of respondent's position insofar as the National Labor Relations Act is concerned is pretty well demonstrated by the history of the cannery cases since March 5, 1946. In brief review, here is the sequence:

1. In the matter of *National Labor Relations Board v. Bercut-Richards Packing Co.*, C.C.A. 9, No. 9499, the Board attempted to charge a number of respondent's fellow cannery employers (all of whom had been involved in the Bercut-Richards representation proceeding) with a contempt of this Honorable Court in executing preferential agreements with the AFL in March, 1946. The Board claimed that this violated

an earlier consent decree, but on July 15, 1946, this Court denied the Board's petition, thereby adjudicating that execution of these other 1946 contracts did not violate the Act. (The contempt proceeding will be discussed more fully later in this Brief.)

2. The Board directed a second election to be held at respondent's Stockton plant on August 31, 1946.

3. At the second election the balloting was as follows:

Votes for AFL 535

Votes for CIO 358

4. In September, 1946, the CIO filed objections to the conduct of the election.

5. Finally, on January 20, 1948, the Board dismissed the representation proceeding. (Daily Labor Report, Jan. 20, 1948, p. A-8.)

It is now three years since the right of the respondent and the AFL to bargain collectively was first questioned. It is now the third canning season since the Board suggested to respondent that it might "recognize each (union) as a representative of its members." If respondent had adopted the Board's view on this issue its employees would still be without an effective representative for purposes of collective bargaining. If this Court should enforce the Board's order there will be no effective bargaining representative until a union (presumably the AFL) again petitions the Board for certification of representatives and the Board, after due deliberation, determines that a certification shall issue.

All in the name of "effectuating the policies of the Act."

The primary objective of the National Labor Relations Act is the promotion of the orderly processes of collective bargaining, as a means of advancing industrial stability and security of employment. Respondent accomplished this objective back in 1939 when it recognized the AFL union as the exclusive representative for purposes of collective bargaining of the employees in the Stockton plant. For six years thereafter respondent bargained with the AFL. During this period a whole pattern of industrial democracy was built up within the plant. Wages, hours of employment, and working conditions were fixed by mutual agreement with union representatives. Shop stewards were chosen to represent employee interests within the plant, and a procedure was developed to handle employee grievances. Union spokesmen had access to the plant and met freely with management. These processes made the collective bargaining principle a living, functioning program, which is precisely what the Act contemplated. But the Board says all this must stop. The Board says there must be several unions in the plant, each speaking for its membership, until the Board determines which is to be declared the winner. This evidently contemplates separate grievance procedures for each union. It is no more feasible to have several labor organizations functioning within the same unit at the same time than it is to have several different courts adjudicating the same case at the same time.

So with the Board's order. If respondent is to be compelled to deal on equal terms with several groups for the same employees there will be industrial chaos with a complete collapse of the collective bargaining which the Act was designed to promote.

In a sense, two conflicting policies are involved in a case such as this: The policy favoring stability of labor relationships, and the policy favoring the right of employees to change their minds about their bargaining representatives.

One function of a labor organization is to establish terms and conditions of employment, which may be fixed for a specified term. Inasmuch as the relationship for an entire unit must be determined by a majority within the union it is impossible to have a complete and unrestrained freedom of choice in selecting the representative. The alternative would be industrial chaos. Collective bargaining would be stultified if the majority status of a union were to be subject to constant questioning. The Board itself has stated the problem:

“The Board was often called upon to determine whether an election could appropriately be held where there was an outstanding contract between the employer involved and a union other than the petitioner covering the employees in issue; or where there was an outstanding recent Board certification of another union as the bargaining representative of the employees concerned. In deciding whether a dismissal of the petition or the direction of an election would best effectuate the policies of the act, the Board weighed the interest

of the employees and the public in preserving the industrial stability implicit in the established bargaining relationship or the certified representative status of the union against the statutory right of employees freely to select and change their bargaining representatives.

“The Board held that, in general, a valid written collective bargaining agreement, signed by the parties, extending for a definite and reasonable period, and prescribing substantive terms and conditions of employment, constituted a bar to a current determination of representatives among the employees covered by such contract until shortly before its terminal date. And, as noted in previous annual reports, this rule applied equally to newly executed agreements and to those renewed pursuant to the operation of automatic renewal clauses.”

National Labor Relations Board, Twelfth Annual Report, p. 9.

In a number of specific instances the Board has refused to give effect to a change in employee choice. The problem in connection with existing certifications is recognized by the Board in *Matter of Reed Roller Bit Company*, 72 N.L.R.B. 927:

“To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, the emphasis can better be placed elsewhere. We think

that the time has come when stability of industrial relations can be better served, without unreasonably restricting employees in their right to change representatives, by refusing to interfere with bargaining relations secured by collective agreements of two years' duration."

It would be quite a different story if, before executing its first agreement with any labor organization, an employer were confronted with claims of majority status by two unions, and he then granted exclusive recognition to one of them, while the right to represent the employees remained unresolved. Such a contract would confer a standing upon the newly recognized union which it did not have before, and would be taken by the employees within the bargaining unit to demonstrate a preference by the employer for the union so favored. This was precisely the situation involved in the *Matter of Midwest Piping & Supply Co., Inc.*, 63 N.L.R.B. 163. The picture is quite different, however, where an employer has maintained exclusive contractual relations with a union over a period of years, and merely reaffirms the established conditions at a time when its exclusive status is under question. In the case at bar, for example, the AFL acquired its contractual standing in 1939, and nothing that respondent did in 1945 or 1946 either added to or detracted from that standing. Any act merely maintaining a long established condition should be interpreted as a recognition of the status quo pending a demonstration that the contracting union has lost its exclusive right to represent the

employees. Otherwise, the mere filing of a petition by a contesting union would strip the contracting group of all the effectiveness that it had built up over a period of years, and would give to the petitioning union a most substantial advantage in soliciting support from the employees.

The Board will entertain a representative petition, supported by only 30 percent of the employees in a unit. (National Labor Relations Board, Statement of Procedure, 29 Code Fed. Reg. Part 202, § 202.16.) Here the CIO made no substantial showing of representation before the election (R. 29), while the Independent, which did, received no votes. (R. 89.) Yet the Board would require the Company to deal with both the CIO and the Independent on an equal footing with the AFL which had represented respondent's employees for years.

Such a contest is in many respects comparable to a political campaign, in which an incumbent serving for a fixed term is being challenged. The party on the inside is restricted in his campaign by his actual record of performance; the one on the outside, however, has no limitations on the criticism to be made of the incumbent or on the promises of performance—always *in futuro*—tendered as bait for the votes. If the established union has made a bad record a petitioning group will be at no disadvantage in enlisting support, whether or not a contract has been renewed during the contest. An exclusive status resulting from an actual and proven majority representation should not be nullified by the mere filing of a petition.

The Board's Midwest Piping doctrine can only lead to the filing of petitions for the purpose of creating an artificial parity with the established union and gaining a grace period for organizing activities. Such a rule would be an invitation to politically minded unions to raid established organizations. There is nothing to lose; file a petition, then organize with the support of the Board's Midwest Piping and Supply doctrine. Instability, such as that experienced by the California Canning industry, is an inevitable result.

B. THE BOARD RECOGNIZES THE DANGERS IN THE DOCTRINE.

During recent months it has been increasingly apparent that the Board, while doing "lip service" to the Midwest Piping doctrine, has in fact been seeking all possible grounds for avoiding its application. A case disposed of by the Board within the year is the *Matter of Ensher, Alexander & Barsoom, Inc.*, 74 N.L.R.B. 1443, another in the cluster of California cannery cases. There a Trial Examiner found that a representation petition was filed in the summer of 1945; that the AFL and an independent union appeared on the ballot; that the AFL received a clear majority of votes cast but that the election was set aside (for the same reason as in the case at bar); and that on February 27, 1946, the employer executed a closed shop contract with the AFL, before resolution of the representation issue. At that time the CIO had made no showing of membership in the plant, but

it later charged the employer with committing an unfair labor practice in executing the agreement. The Trial Examiner concluded that execution of the 1946 contract while a representation issue was unresolved was an unfair labor practice under the Midwest Piping doctrine. The Board reversed the Trial Examiner and held the Midwest Piping doctrine to be inapplicable because of the fact that prior to execution of the contract the contesting independent union had become defunct, and the only union shown by the record to have existed in the plant when the agreement was executed was the AFL.

The Board added (74 N.L.R.B. 1445):

“That (Midwest Piping) doctrine, necessary though it is to protect freedom of choice in certain situations, *can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied.*” (Italics added.)

The Board stated that the signing of the contract should not be regarded as an unfair practice “even though it be technically true that the representation proceeding was still pending before the Board. There was then in actual fact no real question concerning representation of the respondents’ employees to be resolved.” The fact of the matter is, in August of 1946 the Board directed the conduct of an election on the petition filed by the independent union with both the AFL and the CIO, but not the independent, on the ballot. (*Matter of Bercut-Richards, et al.*, 20-R-1414, et al., second direction of election, August 16, 1946.)

Therefore, contrary to what the Board states, there must have been in actual fact a question concerning representation and the Board so recognized. The decision in the *Ensher* case was issued on August 21, 1947.

A more recent case is *Matter of Ellis Canning Company*, 76 N.L.R.B. No. 13, decided February 11, 1948. (This employer was not involved in any of the Bereut-Richards proceedings.)

There a closed shop contract had been in effect with an AFL union for several years, following a certification issued by the Board. It was renewed in 1944, but in February, 1945, a letter was sent to the employer by the union "to the effect this Union will not insist on compliance concerning this Article (closed shop) unless the Union can replace the person it asks to be discharged by a person of like qualifications." The contract, including the closed shop feature, was thereafter renewed to run until July 1, 1946. On January 12, 1946, the CIO commenced an organizing campaign. On January 19, 1946, the AFL notified the employer to enforce the closed shop provision and get all employees in the union within 30 days. On January 21 the CIO filed a representation petition with the Board and notified the employer that it claimed to represent a majority of the employees. Following a refusal to enforce the closed shop provision the plant was shut down because of an AFL picket line. The plant reopened in April, 1946, but only those employees who joined the AFL were hired back. An election was held by the Board in May, but was inconclusive. The issue was stated as follows: "With a valid closed shop con-

tract existing, but with the closed shop provision not having been enforced by agreement between the contracting parties, can these parties in the face of a pending representation proceeding, by oral agreement, decide to enforce the closed shop provisions and require all employees to join the contracting union?" The *Midwest Piping*, *Bercut-Richards* and *Phelps-Dodge* cases were all discussed. The Board upheld the Trial Examiner, who had found no violation of the Act by reestablishment of the closed shop condition, in language as follows:

"Clearly respondent herein knew a 'real question' concerning representation existed when it agreed with the AFL in April 1946, to enforce the closed-shop provision of its contract. Obviously also enforcing this provision was not extending or renewing an existing contract or entering into a new one. If knowledge of the question concerning representation forecloses the respondent from enforcing the closed-shop provision on request of the Union, the doctrine of the *Phelps-Dodge* case is extended. In other words, in so holding the undersigned would be deciding that 'If, during the pendency of an election directed by the Board to resolve a question of representation, an employer extends or renews an existing contract with a labor organization or enforces a provision of an existing contract not theretofore enforced since the signing of that contract—he violates the Act, insofar as that organization is accorded recognition—or employees are required to become or remain members thereof.' Such an extension of the recog-

nized doctrine seems to the undersigned to be unsound."

In the present case, all the company did was to continue the enforcement of a closed shop contract which had been in force for a number of years. Certainly if the test of the legality of the company's conduct is, as the Board's brief argues, whether or not it constitutes a departure from neutrality, during pendency of a dispute concerning representation, the conduct of the respondent in the present case comes much closer to the ideal standard of neutrality. The respondent here maintained the status quo during the pendency of the question concerning representation. The conduct of the company in the *Ellis Canning* case altered the status quo to the prejudice of the petitioning CIO Union and to the assistance of the contracting AFL Union, but such conduct was held valid. If the conduct of the company in the *Ellis* case was not a forbidden departure from the standard of neutrality imposed by the law *a fortiori* the conduct of respondent was legally permissible.

A third case is *Matter of Eaton Manufacturing Company*, 76 N.L.R.B. #40, decided February 20, 1948. In the *Eaton* case the AFL union's exclusive bargaining status remained unquestioned from 1941 until April, 1946. A two year contract, expiring on May 15, 1946, required maintenance of membership in the union and compelled union affiliation for new employees upon completion of a probationary period. On April 8, 1946, the CIO

filed a petition with the Board for certification of representatives and so notified the employer on the following day. Vigorous campaigns for support were thereafter waged by both unions. The AFL demanded dismissal of a number of active CIO supporters, but partly because of a restraining order, and because of a belief that dual unionism was the real basis for the invocation of the maintenance of membership provision of the contract, the employer refused to effect discharges. On May 13, 1946, the employer and the AFL executed a new contract, for a two year period, with substantially the same conditions as the expiring agreement including an identical maintenance of membership provision. It was agreed, however, that the status of the AFL union was to be contingent on the results of the representation proceeding and a complaint case then pending before the Court. Upon the effective date of the new agreement the employer dismissed certain employees upon demand of the AFL for failure to retain good standing. The Board charged that the dismissals, certain remarks of a superintendent, and execution of the new agreement on May 13, 1946, all constituted violations of the Act. In finding that execution of the 1946 contract violated the Act the Trial Examiner found as follows:

“The second is based upon the respondent’s execution of the May 1946 Master Agreement with the AFL. This exclusive collective bargaining contract containing provisions which conditioned employment on continued member-

ship in the AFL was made in the face of the CIO representation petition and the CIO unfair labor practice charge, both of which were pending undetermined before the Board at the time the contract was executed, and at a time when the respondent was aware, as evidenced by the stipulation executed simultaneously therewith, that there existed a real question concerning representation affecting its Saginaw employees. Under the circumstances and for the reasons expressed in the *Midwest Piping* case, the principle of which is clearly controlling here, the undersigned finds that the respondent, by its conduct in executing the Master Agreement in May 1946, contravened the letter and spirit of the Act, breached its obligation of neutrality, indicated its approval of the AFL, accorded the AFL unwarranted prestige, encouraged membership in the AFL, discouraged membership in the CIO, and thereby rendered unlawful assistance to the AFL.

* * * * *

Equally without sound basis is the contention made by the AFL that the *Midwest Piping* doctrine should in no event be applied in a case where the processing of a representation petition has been delayed by the filing of a charge by the petitioner, and particularly so where the charge is subsequently found to be unsupported. The AFL argues that the application of that doctrine in such a situation would encourage petitioning unions to continue to engage in 'dog in the manger' tactics, such as the Board condemned in the *General Electric X Ray* case, and would permit them in effect to circumvent the

rule of that case by filing delaying charges, in order to gain additional time for organizational activities. While the possibility of abuse of the Board's process by such tactics cannot be ignored, the solution is not to be found in the suggestion of the AFL that the Board uphold contracts made in the face of pending representation proceedings where the filing of charges by the petitioner has intervened. That in effect asks the Board to relinquish its protection of employee rights against employer interference. Rather, it lies in administrative vigilance in guarding against abuse of the Board's process and in the expeditious processing of cases. * * * Moreover, as the Board found in the *Midwest Piping* case, where a somewhat similar argument was advanced, the fact, 'that no unfair labor practices are found * * * on the original complaint does not alter the effect of the respondent's later breach of its neutrality obligation.' "

When the case came before the Board for decision, these findings of the Trial Examiner were completely reversed. The Board disposed of the *Midwest Piping* problem in the following language (*Matter of Eaton Manufacturing Company*, 76 N.L.R.B. #40, page 6):

"The Trial Examiner found that the respondent violated Section 8 (1) of the Act by executing the 1946 agreement with the UAW-AFL while the UAW-CIO's previously filed representation petition was pending before the Board undetermined. Because of the UAW-CIO's subsequent conduct in preventing a prompt determination by filing an unfair labor practice charge against the respondent which we find to be groundless, we do not adopt this finding."

Although the Board elsewhere invalidated the contract upon the ground that it was executed by both parties as a means of securing dismissal of certain employees, it is apparent that the principle of the *Phelps Dodge*, *Midwest Piping*, *Bercut-Richards* and *Flotill* cases was summarily overruled. As in the cases named, there was a representation question pending before the Board when the contract was signed.

The Board justified its refusal to follow its "well established" cease bargaining doctrine on the ground that the CIO's conduct prevented a prompt determination of the question concerning representation. In the present case, as appears from the record, a prompt determination of the question concerning representation was likewise rendered impossible by circumstances beyond the respondent's control. In fact, in January of 1948 the question concerning representation still had not been resolved and the petition was then dismissed. If, as the Eaton decision implies, the cease bargaining doctrine is not to be followed in those instances in which a prompt determination of representatives is not possible, then the doctrine should not be applied to the conduct of the respondent in the present case.

The most significant conclusion which may be drawn from the recent Board decisions cited above is that the cease bargaining doctrine is actually not a rule of law invariably applied whenever the same circumstances arise, but that it is an arbitrary principle which may operate in derogation of the practice

of collective bargaining, and which, therefore, is sparingly applied; which the Board follows under some circumstances, but which it may refuse to follow under similar circumstances. The law must be uniformly and fairly applied—it must be certain. Such an arbitrary principle cannot be judicially sanctioned. *N.L.R.B. v. North American Aviation, Inc.*, 136 F. (2d) 898, 7 Labor Cases 64,853.

C. THE DECISIONS RELIED UPON BY THE BOARD DO NOT SUPPORT THE BOARD'S CONTENTIONS.

The Board, at page 8 of its Brief, tries to give this case the appearance of being a routine application of elementary and well established principles under the National Labor Relations Act. The Board says (Brief, p. 8):

“This case presents no novel questions. It is, as the Board pointed out (R. 75-77) and we shall later show, consonant with well-established doctrine long ago enunciated by the Board and uniformly approved by the courts.”

We respectfully take issue with the statement that this case involves merely “well-established doctrine” of the Board, and that such doctrine has been “uniformly approved by the Courts.”

As we have seen, the Board itself is shying away from its “well established doctrine;” first by recognizing its dangers in the *Ensher, Alexander & Barsoom* case; second, by refusing to apply it to a material change in actual employment conditions be-

cause of the existence of an inactive contractual provision, in the *Ellis Canning Company* case; and third, by simply looking the other way, in the *Eaton Manufacturing Company* case.

At page 18 of its Brief the Board says that its finding "that the actual grant of formal recognition to one of several competing unions pending the resolution of a question concerning representation constitutes unlawful assistance, has been upheld in the two cases involving this principle which have thus far come before the courts". The cases cited are *N.L.R.B. v. John Engelhorn & Sons*, 134 F. 2d 553, 556 (C.C.A. 3); and *N.L.R.B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C.C.A. 5). Neither case is in point; in the *Engelhorn* case the Court refused to discuss the issue; in *Southern Wood Preserving Co.*, neither a previous contract nor other unions were involved in the Board's order.

In the *Engelhorn* case an AFL union had had a contract with the employer which ran until November 1, 1938, subject to automatic renewal in the absence of previous notice. No notice was ever given. In April, 1941, the CIO began to organize the employees and requested a bargaining conference with the employer. This was refused on the ground that the 1938 agreement was still in effect. On May 13, 1941, the employer was notified of the pendency of a representation petition filed by the CIO. On May 19 most of the employees went out on strike but on May 29 the employer and the AFL, with knowledge of the pendency of the representation question, signed a

new contract providing for a closed shop. Thereafter the Board conducted a hearing on the representation petition and held an election which the CIO won. The employer refused to bargain with the CIO and dismissed four employees pursuant to its closed shop contract with the AFL. As a defense to a Board order requiring their reinstatement the employer urged the AFL closed shop contract. The board argued that the contract was invalid, and on the issues so raised the Court stated:

“The first (argument) is that the employer may not raise for his protection in this proceeding a closed shop contract made with Local 174 (AFL) at a time when the employer knew that an investigation and certification proceeding, instituted by a rival labor organization claiming a majority of the employees, was pending. The Board, in accordance with its previous decisions, so held. *This proposition of law does not seem to have been squarely decided by any court decision. Nor need we decide it here, for we consider the second line of attack sufficient.* We think, as did the Board, that the agreement was invalid in view of the employer’s activities attending its execution.” (134 Fed. 2d at 555-56. Italics added.)

“The case is thus one where the employer negotiates a closed shop contract with a labor organization which he assisted by conduct defined by the Act to be an unfair labor practice. Such a contract is invalid under the proviso of § 8 (3) of the Act (citing cases), and cannot operate as a bar to proceedings before the Board.” (134 F. (2d) at p. 557.)

The Court in the *Engelhorn* case thus expressly *refused* to consider the "well-established doctrine" advanced by the Board here.

In the *Southern Wood Preserving* case, the employer, in September, 1941, had contracts with an AFL union which included closed shop and check off provisions. The contracts were to expire on October 11, 1941. On September 17, 1941, a CIO union notified the employer that it represented a majority of the employees, and on September 18 the CIO petitioned the Board for certification of representatives. On September 29, 1941, the employer made a new contract with the AFL union; the plant was closed for several hours to enable employees to vote on it, three foremen advised employees to attend the ratification meeting if they wanted to keep their jobs, and a foreman referred to CIO posters as "foolishness which would have to stop or something would have to be done about it". In November, 1941, the employer enforced the closed shop agreement and discharged 19 men. Thereafter the CIO won a Board election, the employer negotiated with it and reinstated the men. Another employee, allegedly discharged for cause, was not reinstated.

The Board order was limited to a restraint against discouraging membership in the CIO, or any other labor organization, by discharging or otherwise discriminating against employees, and directed reinstatement of the one employee with back pay. No reference was made to the AFL union or to the contract executed with it in September, 1941. (45 N.L.R.B.

239-40.) The employer urged that the matter had become moot because of recognition of the CIO union and reinstatement of the men, but the Court pointed out that one man had not yet been restored to work. Said the Court:

“We think also that the circumstances, especially the discharge of Turner, and the premature signing of a new contract with the Engineers union and the unusual facility afforded of shutting down the plant to vote on it, are sufficient to show a support by the employer of that Union as against its rival, contrary to the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. Financial support is not the only kind of support forbidden.” (135 F. (2d) at p. 607.)

The *Southern Wood Preserving* case presents another employer who has rendered unlawful support to a contract union and whose bargaining contract is thereby vitiated. To that extent it is comparable to the *Engelhorn* case. But as neither the Board's decision nor the Court's opinion mentions the earlier contract or the previously contracting AFL union, the *Southern Wood Preserving* case lends no support to the Board's claim that its “well-established doctrine” has been “uniformly approved by the courts.” The case obviously did not involve the cease bargaining doctrine.

**D. THE BOARD'S "CEASE BARGAINING" DOCTRINE IS
INCONSISTENT WITHIN ITSELF.**

Logically the Board's doctrine in this case is impossible to support. The Board says that respondent must remain neutral pending the outcome of the representation question, but at the same time keep the 1945 contract in effect until March 1, 1946, with its substantive provisions intact, and then says that from March 1, 1946, on, respondent cannot even reaffirm what has already existed for six years.

1. The Law Required Respondent to Bargain Under Its Valid Contract.

Even under the Board's order in the instant case, and the Berent-Richards orders which preceded it, there was nothing to stop the customary functioning of the bargaining relationship between respondent and the AFL until at least March 1, 1946. The obligation of an employer to bargain collectively is a continuing duty, and it is not satisfied merely by the execution of a contract. The Board has said, in its Ninth Annual Report:

"The employer is under a further duty to negotiate concerning the modification, interpretation and administration of the existing agreement." (National Labor Relations Board, Ninth Annual Report, p. 46.)

"By signing a trade agreement an employer does not purchase immunity from the requirements of good faith and honest negotiation which are basic to Section 8 (5) of the Act * * *" (*Matter of George E. Carroll*, 56 N.L.R.B. 935.)

The nature of the obligation was more extensively discussed by the Circuit Court of Appeal for the Third Circuit in *N.L.R.B. v. Newark Morning Ledger Co.*, 120 F. (2d) 262, certiorari denied 61 S. Ct. 363, wherein the Court said:

“Furthermore, it may at any time become desirable or indeed necessary to bargain collectively for the modification of an existing collective agreement which has proved in practice to be in some respects unfair or unworkable or for the adjustment of complaints or alleged violations of such an agreement. Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.” (120 F. (2d) 264.)

2. The Board Recognizes a Continuing Obligation to Bargain Despite the Representation Issue.

In its orders in the *Bercut-Richards* representation cases, to which respondent was a party, the Board expressly recognized an obligation upon respondent to observe all its contractual responsibilities with the AFL until March 1, 1946. In its Decision, Direction of Election, and Order of October 12, 1945, the Board said (R. 26):

“However, any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose

of designating a bargaining representative to negotiate a new agreement *to become effective upon the expiration of the existing contract.*" (Italics added.)

If the Board had had the capacity, prior to March 1, 1946, to cope with the problem which it was creating the issues raised by its *Midwest Piping* doctrine would have become moot. But unfortunately for the Board, and for the canners, and for the unions, and for the employees themselves, the Board, instead of solving the problem, made a bad situation worse. Whatever the reason, the Board was unable to set up an adequate election procedure for the balloting in October, 1945, and the following February the Board was compelled to observe:

"We therefore are constrained to conclude that the balloting was not conducted in accordance with our usual standards or under conditions tending to create confidence in the result or to lay the foundation for satisfactory bargaining. We are of the opinion, therefore, that the purposes of the Act will be best served by setting aside all of the elections held herein." (R. 58.)

Thereupon the Board recognized the continuing nature of respondent's obligations under the existing contracts, and, mounting its snow-white steed, rode off furiously in all directions at once:

"While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season,

until a new election can be held which may result in one of the rival unions being certified. The current A.F.L. contract will expire March 1, and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,¹⁴ the employers may not pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as the representative of its members. In this state of the record, no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date;¹⁵ the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in Subsection 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions of employment now existing by virtue of the foregoing agreements.”

Matter of Bercut-Richards Packing Co., Supplemental Decision and Order, 65 N.L.R.B. 1052, 1057-58; R. 58-59; issued February 15, 1946.

¹⁴See *Matter of Midwest Piping & Supply Co., Inc.*, 63 N.L.R.B. 163. See also *Matter of Ken-Rad Tube & Lamp Corp.*, 62 N.L.R.B. 21.

¹⁵Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, 46 N.L.R.B. 1040.

3. The Board's Policy is Against Logic.

To summarize then, the law required the respondent to continue to bargain collectively with the AFL despite the pendency of the representation case. The Board recognized that this obligation existed at least up until March 1, 1946. The Board would terminate not only respondent's obligation to bargain, but also its right, and the rights of the AFL to continue to bargain as of that date merely because of the pendency of the representation proceeding. The unhappy dilemma in which respondent found itself on February 15, 1946, points up the utter illogic in the *Midwest Piping* doctrine and its application to this case. Here was an employer who had conferred an exclusive and unquestioned recognition upon the AFL continuously since 1939, with a closed shop and dues check-off in effect continuously since 1941. The master industry contract, adopted by respondent and the AFL, was self-renewing in the absence of certain affirmative action to be undertaken by either party upon termination of negotiations. The closed shop supplement remained in effect as executed in 1941, because it, too, was self-renewing and neither party took steps to terminate it or modify it. Because the Board was unable to resolve the representation issue it endeavored to create, with one mystic pass over its crystal ball, a condition of neutrality intended to be all things unto all men. First: the existing contract was to remain in full effect until March 1, 1946. Second: the closed shop provision could be enforced up to March 1, 1946, but not thereafter. Third: Dis-

charges ostensibly under the closed shop clause, but actually because of election activity, could not be justified even prior to March 1, 1946. Fourth: after March 1, 1946, none of the unions was entitled to an exclusive status as bargaining agent. Fifth: after March 1, 1946, each union could be recognized as the representative of its members. Sixth: the decision did not require change in the substantive conditions of employment then existing by reason of the current collective bargaining agreement.

The Board advances its *Midwest Piping* doctrine as a necessary element in its "doctrine of employer neutrality." (Board's Brief, p. 9.) We might agree that where an employer has not previously dealt with unions, his initial expression of preference could be improper if made during pendency of the representation question. We might also agree that the conferring of an additional privilege or benefit to an "in" union could be improper if extended during the pendency of the question. But what, we ask, is improper, or unneutral, in continuing the established relationship with the old union? What did respondent give to the AFL on March 5, 1946, that the AFL did not have on February 28, 1946? Nothing.

We say that there is no logic in the Board's position here. If respondent is guilty of an unneutral act in giving effect to a long-established closed shop condition on March 1, 1946, why is it not also guilty of an unneutral act in giving effect to the closed shop condition on February 28, 1946? Or on February 15, 1946, when the Board set aside the first election?

Or on October 15, 1945, when the Board held the first election? Or on July 3, 1945, when the representation issue was first raised?

If the AFL is properly entitled to an exclusive recognition on July 3, 1945, and on October 12, 1945, and on February 15, 1946, what would make such recognition so noxious on March 1, 1946?

If the obligation of respondent to bargain collectively with the AFL continued from July 3, 1945, to February 28, 1946, during all of which period the representation issue was before the Board, by what process does that obligation cease on March 1, 1946?

We submit that there is nothing in law or in reason to give any such significance to the first day of March—nothing save the administrative fiat of the Board.

The Board's grave concern over employer neutrality is groundless, as the record itself will demonstrate. The CIO union was able to secure, prior to September 11, 1945, a total of 10,128 designations from among 32,287 employees of members of the C.P. & G. unit. (R. 28.) Although respondent was not a member of the C.P. & G. unit the position of the AFL in both cases was quite similar. The fact that the AFL had had an exclusive bargaining status within the C.P. & G. for about eight years did not restrain the "out" union from making a substantial showing.

Furthermore, the one thing employees are most concerned about is their job security during an inter-union election campaign. If they can be sure that their union activity will not result in discrimination

because of employer displeasure they have a very real protection which affords them a positive advantage in their electioneering. As the Board pointed out in its Supplemental Decision of February 15, 1946 (R. 59), such protection exists under its *Rutland Court* doctrine, approved by this Court in *N.L.R.B. v. Portland Lumber Mills*, 158 Fed. (2d) 365. Under that doctrine an employee may not be discharged under a closed shop contract if the reason for the discharge is known to be dual unionism by the employee. Such protection to the members of the contesting union is all that they legitimately need, and all that they are entitled to under the Act.

E. THE "CEASE BARGAINING" DOCTRINE IS CONTRARY TO LAW.

1. The Law Does Not Require Certification by the Board as Condition Precedent to Bargaining.

The normal collective bargaining relationship is initiated without the formality of a Board hearing and certification. In the usual case a union makes a showing to the employer sufficient to convince the employer that it has authority to speak for the employees, and from that point forward the bargaining relationship proceeds. If the union were required to go through a representation proceeding and an election before it could bargain with the employer the Board would be swamped with representation cases. No such folly was intended by the Act.

The Board itself recognizes that a contract with a union lacking a certification is perfectly valid if the union represented a majority at the time the contract was made. In fact, the Board will even presume that the union represented a majority, and will reject proof to the contrary. In the *Matter of Electro Metallurgical Company*, 72 N.L.R.B. 1396, at page 1399, the Board said:

“As to the contention that the Intervenor did not, on the date when the contract was executed, represent a majority of the employees in the unit, it is the practice of the Board in representation cases, at least so far as the question of a bar to a proceeding is concerned, to presume the legality of a collective bargaining agreement and to refuse to admit evidence on the question whether, at the time the contract was executed, a majority of the employees covered by such contract had designated the contracting unit as their bargaining representative. Accordingly, we find that this position of the Petitioner is untenable.”

Any other policy would give an unwarranted weight to certifications in cases where there is no evidence of unlawful assistance and would put a premium on arbitrary insistence upon resort to Board procedure, to the discouragement of voluntary bargaining.

2. The Board's Direction to Bargain With Several Unions is Contrary to Congressional Intent.

The policy of the Act is to encourage bargaining with representatives of a majority of the employees within a unit. Of necessity this policy precludes a bargaining with two unions. The impossibility of a

dual bargaining relationship was in the minds of the Congress at the time the Act was adopted, and the intent to outlaw it is plain. In discussing the majority rule features of Section 9 (a) of the Act the Report of the Senate Committee on Education and Labor (Senate Report no. 573, 74th Congress, 1st session) says, at page 13:

“The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.”

Again the House Committee on Labor (House of Representatives, Report no. 1147, 74th Congress, 1st Session, at pages 20-21) makes the following observations on the principle of majority rule:

“The misleading propaganda directed against this principle has been incredible. The underly-

ing purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

“It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in the *Matter of Houde Engineering Corporation* (1 N.L.R.B. 35 (Aug. 30, 1934)):

“ ‘It seems clear that the company’s policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating object of the statute. In the first place, the company’s policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. * * * Secondly, the company’s policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.’

“Speaking of the company’s suggested alternative that it deal with a composite committee made up of representatives of the two major conflicting groups, supplemented by other individual employees, the Board pointed out:

“ ‘This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers’ representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of

bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissension and rivalry. * * * ”

The Act itself is plainly lacking in any declaration, either express or implied, that an employer should change the status quo during pendency of a representation issue. And the Congress did not want the Board to attempt to write into the Act what Congress had omitted. The Senate Committee said:

“Sections 7 and 8. Rights of employees—Unfair Labor practices.—

These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section. 8. This is made clear by paragraph 8 of section 2, which provides that ‘The term “unfair labor practice” means any unfair labor practice listed in Section 8’, and by Section 10 (a) empowering the Board to prevent any unfair labor practice ‘listed in Section 8.’ Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the Courts are given any blanket authority to pro-*

hibit whatever labor practices that in their judgment are deemed to be unfair. Secondly, as will be shown directly, the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law.” (Report of Senate Committee on Education and Labor, *supra*, pp. 8-9. Italics added.)

3. The Courts Have Uniformly Frowned Upon the “Cease Bargaining” Doctrine.

(a) Consolidated Edison Company v. N.L.R.B.

The United States Supreme Court has passed upon an almost identical situation in *Consolidated Edison Company v. N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126.

On May 5, 1937, a CIO union filed a charge with the Board alleging that Consolidated Edison Company was violating the Act in interfering with employee organization, and in supporting an AFL union. Between May 28, 1937, and June 16, 1937, the Company executed its first collective bargaining agreements with the AFL—contracts which for the first time recognized the AFL as the representative of its members, established wages and working conditions, and contained no-strike provisions. The proceeding initiated by the CIO was pending before the Board at the time these agreements were negotiated. Following a hearing to which the AFL was not made a party the Board issued an order which, among other provisions, found that the Company had not dominated or interfered with any labor organization, and directed that the Company cease giving effect to its AFL contracts. The AFL union represented about

80 per cent of the employees eligible for membership in it. The Board sought to justify its order setting aside the AFL contracts on the ground that it would effectuate the policies of the Act, under Section 10 (c). On this issue the Court made this statement which is most significant here:

“Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of § 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices ‘and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.’ We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.” (305 U.S. at pp. 235-36; 83 L. ed. 143.)

The Court goes on to indicate that a majority once established and recognized by the employer retains its standing until another agency supplants it in the manner set out in the Act.

“The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record, there is nothing to show that

the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. *The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

"Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees' stands on a different footing. The

contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law." (305 U.S. 237, 238-39; 83 L. ed. 144, 145 (*Italics added.*)).

The logic of the Supreme Court's decision is directly applicable here. The disruption of respondent's contracts even pending the representation proceedings would remove their protection during the intervening period. The policy of the law required the continuance of these contracts and not their abrogation.

(b) *N.L.R.B. v. McGough Bakeries Corp.*

N.L.R.B. v. McGough Bakeries Corp., 153 F. (2d) 420, involved a contest between a CIO union and an independent union. In 1942, at a time when the CIO was the only labor organization contesting for the right to represent employees, a strike had been called and to induce resumption of work the employer agreed to a closed shop contract with the CIO. Both

the Board and the Circuit Court of Appeals determined that the closed shop contract was invalid because the CIO was not shown to be the representative of a majority of the employees at the time it was made. During this period the Board declined to investigate the question of representation because only one union claimed bargaining rights.

The closed shop agreement with the CIO was renewed on May 10, 1942, for a three year period. In February, 1943, some of the employees established an independent union and asked for bargaining privileges, claiming to represent a majority. The Company refused to negotiate with the Independent because of the outstanding closed-shop contract, and suggested that the Independent file a representation petition with the Board. Such a petition was filed by the Independent on March 5, 1943, but the CIO filed a charge that the Independent was company-dominated. The Board did not act on either petition. On May 15, 1943, after expiration of the CIO contract, the Independent and the Company commenced bargaining with the result that a closed-shop contract was signed with the Independent for the first time. Discharges made pursuant to the Independent's closed-shop contract served as the basis of a complaint issued by the Board.

The Board found that the Independent was company-dominated, made no finding as to whether the Independent represented a majority at the time its contract was signed in May 1943, and applied the Midwest Piping doctrine, saying:

“However, on May 15, 1943, shortly after the expiration of the (CIO) Union’s closed-shop contract, *notwithstanding the pendency of the aforementioned representation petition* and unfair labor practice charge, the respondent, hastily and without requiring proof of the Independent’s alleged majority status, entered into an illegal closed-shop contract with the Independent, as found in the Intermediate Report.” (Italics added.)

58 N. L. R. B. 848, 851.

The Circuit Court held that as a matter of law the record demonstrated that the Independent represented a majority of the employees at the time of its closed-shop contract in May, 1943, and that the record failed to show it to be company-dominated, stating:

“The trial examiner next brings forward the fact that the Independent was contracted with. *It had a right to be, since it was in fact the majority representative.*”

153 F. (2d) at 424.

The Board, at pages 19-20 of its Brief (footnote 9), has anticipated our reference to the *McGough* case with the declaration that it “simply did not involve an adjudication of the validity of the doctrine of the instant case”. On the contrary, the Board invoked the Midwest Piping doctrine, but the Court, although not making direct reference to it, upheld the questioned contract because it was made with a union entitled to speak for all the employees. Significantly, too, in the *McGough* case the action which the Board

questioned and which occurred during the pendency of the representation issue consisted of an exclusive recognition by the employer and a closed-shop contract. With but a single act the employer gave the Independent virtually all that could be given to it. In the base at bar, however, respondent Flotill Products, Inc., merely maintained the *status quo*.

The Board would have this Court ignore the pendency of the representation issue as a factor in the *McGough* case because “* * * the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into”. Careful reading of the Trial Examiner’s Intermediate Report, the Board’s Decision and Order (58 N.L.R.B. 848), and the Circuit Court’s opinion fails to show any basis whatsoever for these statements by the Board’s counsel in its briefs.

4. Two Cases Decided by this Court are Contrary to the Board’s Decision in this Case.

On at least two occasions this Court has declined to approve the “well established principle” invoked by the Board.

(a) **N.L.R.B. v. Pacific Greyhound Lines, Inc.**, 106 F. (2d) 867, decided September 19, 1939.

In December, 1936, the Board had issued an order directing Pacific Greyhound to cease discouraging membership in the Brotherhood of Enginemen or any other labor organization, from encouraging member-

ship in the Drivers Association or any other labor organization, and from otherwise dominating any labor organization or interfering with the rights of employees under the Act. The Board's order was thereafter enforced by decree of this Court.

Upon entry of the decree both the Enginemen and the Drivers Association ceased to have any relations with Greyhound or its employees. At a time prior to April 21, 1937, a number of employees affiliated with the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, and a collective bargaining agreement was executed by Amalgamated and Greyhound. On September 7, 1937, a new agreement was signed, to remain in effect until December 31, 1938. This provided for the exclusive recognition of the Amalgamated, and was self-renewing in the absence of 60 days' notice prior to December 31. At the same time it was agreed that within 30 days after approval of the arrangement by the members of Amalgamated and notice thereof to Greyhound, membership in the union would be required as a condition of employment. This arrangement became effective by agreement on April 15, 1938.

In June, 1938, a new union entered the picture, the Brotherhood of Railway Trainmen. The Trainmen and Amalgamated both filed petitions for certification with the Board, and, following a hearing, the Board issued a direction of election on October 29, 1938. Prior to the elections and on or before October 31, 1938, the closed-shop agreement was extended for an additional year and was modified so that it could be

terminated by either Greyhound or the then bargaining agent for the men, Amalgamated, on 60 days' written notice from either party to the other.

The Board claimed that this modification constituted a violation of this Court's earlier decree, and sought to have Greyhound adjudged in contempt. Greyhound moved to dismiss the Board's petition upon the ground that it did not set forth facts showing a violation of the decree. This Court granted Greyhound's motion, and on the subject of the effect of the pendency of the representation question upon the modification of the agreement in October, 1938, had this to say:

"We are unable to find in this modification of the agreement any justification for the Board's charge that it constituted a contempt of our decree or any violation of the Act. On the contrary, it seems in aid of the Act's declared purpose of a speedy disposition of labor disputes. *We regard the contract, as modified, then to be binding on the employees and on the company and not affected by the fact that undetermined proceedings were pending before the Board.* Consolidated Edison v. N.L.R.B., 305 U. S. 197, 237."

106 F. (2d) at p. 869. (Italics added.)

The Board asserts that the *Greyhound* case did not involve the Board's cease bargaining doctrine. A careful examination of the pleadings and briefs in that case discloses that the Greyhound Company argued that the law did not require it to cease bargaining collectively with the Amalgamated despite the pendency of the representation proceedings while the

Board argued that to continue to bargain collectively with the Amalgamated during the pendency of the representation proceedings was contrary to law, and likewise contrary to the decree of this Court. This Court in dismissing the Board's petition held expressly in the language quoted above that it regarded the contracts as binding on the employees and on the company, and not affected by the fact that representation proceedings were pending before the Board, citing the *Consolidated* case. The cease bargaining doctrine, therefore, was considered and explicitly rejected by this Court in the *Greyhound* case.

(b) **N.L.R.B. v. Bercut-Richards Packing Co., C.C.A. 9, No. 9499, decided July 15, 1946.**

On May 23, 1946, the Board filed with this Court in the above case its "Petition For Rule To Show Cause, To Adjudge In Contempt And For Other Relief". In sum the Board requested the Court to find that certain activities of the California Processors and Growers, Inc., its members and certain specifically named canners, principally the renewal and enforcement of their contract with its union shop provisions, violated a decree of the Court entered on July 15, 1940. Pertinent portions of the decree appear in the Appendix to this Brief at pages i-iii. The petition sets out at some length the conduct alleged to be a violation of the decree. It is sufficient for present purposes to say that the petition recites in detail the claim of the Board, which is the principal basis of the proceeding here before the Court, that during the pendency of the representation proceed-

ing the employers could not without violating the law (and the decree) renew their contract with the AFL and continue to make it effective.

The respondents filed a lengthy return and answer to the Board's petition which related at considerable length the history of the relationship between respondents and the AFL, and which vigorously defended the continuance of the bargaining relationship during the pendency of the representation issue. The AFL was granted leave to file a petition in intervention which raised the same issue.

The Board moved to strike the respondents' answer and asked for a summary adjudication on the pleadings, claiming that the admission of continued bargaining pending the representation issue constituted a minimum showing of a violation of the decree. (Board's Motion to Strike, etc. proceeding No. 9499, pages 9-10.) Briefs were filed in which the principal issue discussed was whether continued recognition of the AFL after March 1, 1946, while the representation question was unresolved, was a violation of the decree and the Act. (The parties treated the decree and the Act as coextensive for the purposes of that proceeding.)

On July 15, 1946, this Court denied, without opinion, the Board's petition to adjudge the respondents in contempt. The Board requested a clarification on July 23, 1946, upon the stated ground the Board could not determine whether the Court's action was intended to decide the legality of the execution of the

1946 contracts and thereby bar the Board from questioning these contracts in other proceedings then pending before the Board. The request for clarification was likewise denied.

Under these circumstances we take the dismissal of the contempt proceeding to be an adjudication on the merits, under Rule 41(b) of the Federal Rules of Civil Procedure which by rule of this Court have been made applicable.

“* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

Compare

Napa Valley Electric Company v. Railroad Commission, 251 U. S. 366, 64 L. ed. 310;

Lyons v. Perrin & Gaff Manufacturing Co., 125 U. S. 698, 31 L. ed. 839.

By rule the presumption is thus conclusive and irrebuttable that the disposition of the contempt case constituted an adjudication of the validity of the 1946 contract between the AFL and other California canners, and that the continuance of negotiations while the Board attempts to dispose of a representation question does not violate the National Labor Relations Act. Because of the identity of the issues the contempt adjudication is a decision directly in point rejecting the Board's "cease bargaining" doctrine.

IV.

THE BOARD'S BRIEF.

We have already commented on the inadequacies of the statement of facts found in the Board's brief, and in view of the extended argument upon the merits we hesitate to make a point-by-point reply to the Board's argument. The Board is plainly wrong, or misleading, in so many of its conclusions, however, that a short reply is essential, even at the risk of repetition. All page references, unless otherwise noted, are to the Board's Brief.

Pages 7-8. We agree with the Board that employer neutrality is essential in the selection of bargaining representatives. We renew our contention, however, that by maintaining the status quo this respondent took the only course which constituted a *de facto* neutrality. To have changed the long-established relationship with the A. F. L. would have been an unwarranted and improper discrimination against it.

The reference to *International Association of Machinists v. N.L.R.B.*, 311 U. S. 72, 78, is inapposite here. That case involved a closed shop contract executed with a union found by the Board to have been unlawfully assisted by the employer, and the assistance vitiated the contract. In the case at bar the "employee choice" was expressed in 1939, and a termination of the relationship on March 1, 1946, would have been taken as evidence of an employer prejudice against the established union.

Pages 9 to 11, Importance of Neutrality. We agree that when employees are about to express a preference for a union the employer must "remain scrupulously aloof." Again, we say that by maintaining the status quo respondent observed this condition to the letter. On this subject the Board makes two observations:

One, that where only one union is a candidate for employee favor the employer cannot participate in the contest. This rule, which is indeed a well-established doctrine, is not in issue in this proceeding. The cases cited by the Board all involve instances of direct employer statement of preference, discharges or other discrimination to influence employee choice, refusal to bargain, or other forms of interference with or domination of a contesting union.

And, two, that where more than one union is competing the employer may not become a participant by giving to either union an advantage or disadvantage over the other. Here the respondent Flotill gave nothing to either group during the pendency of the representation question. What the A.F.L. obtained from Flotill it obtained in 1939 and 1941, and not in 1946.

Except for the *Waterman* case the decisions cited by the Board all involve campaigns of employer interference with employee choice by such activities as supervisory comment, discrimination against employees, and threats of reprisal for unapproved selection of unions. None of these factors is involved in this case. In *N.L.R.B. v. Waterman Steamship Corp.*,

309 U. S. 206, 84 L. Ed. 704, the employer, a steamship company, had denied to a contesting union the right to send representatives aboard ship to make contact with the men, while such access was accorded the contracting union. Because of the nature of the employment this amounted to an effective isolation of the employees from all influences save those of the employer and the contracting union. It was in that connection that the Court said (309 U. S. at p. 226):

“Enough has been shown to establish the reasons for the Board’s decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. L.”

Significantly in the case at bar the Board expressly absolved Flotill of failing or refusing to give the C. I. O. union proper access to the employees or to the plant premises. (R. 92.)

Pages 11 and 12. Here the Board reviews its findings very unfairly. The Board says that on March 5, 1946, respondent “entered into a contract with the AFL. . . . granting it not only an exclusive recognition but also a closed shop for an indefinite period.” (Board’s Brief, p. 10.) This is not true. The grant of exclusive recognition to the A.F.L. was made in 1939; the grant of the closed shop contract was made in 1941, not in 1946, and the Trial Examiner expressly found that there was a prior valid, closed-shop contract. (R. 95.) Furthermore, on March 5, 1946, the only incident that occurred was a reaffirmation of the

continuing closed-shop arrangement; the basic collective bargaining agreement, which established the exclusive recognition, was self-renewing, and was not modified, or even negotiated, in 1946. On page 10 the Board says that respondent "granted 'potent assistance'" and conferred the additional advantage of a closed shop. We repeat: In March, 1946, respondent conferred nothing on the A. F. L. that the A. F. L. had not enjoyed over a period of years, including the period of the hearing on the representation issue and the conduct of the first election.

Pages 12 to 14. The Board says that exclusive recognition may be conferred only upon a union whose majority status is free from doubt. In this case when recognition was conferred, in 1939, there was no doubt as to majority status of the A. F. L. The respondent neither granted to, nor bestowed upon, the A. F. L. any advantage in 1946. The cases cited by the Board on this subject involve either an employer establishment of a contending union, or an initial recognition or other advantage conferred during a dual union contest.

Pages 14 to 20. The Board says that the "grant" to the A. F. L. of exclusive recognition constituted unlawful assistance. Our observations on the Board's views on this subject have been too often stated to require repeating here. Again, the precedents relied on by the Board all involve instances of unlawful assistance to employer-dominated company unions, or the initial establishment of advantages to a contest-

ing union. The *Waterman* case (supra, p. 59) has nothing to do with the issues raised here, as we have pointed out, and upon the question of union access to employees (the point involved in *N.L.R.B. v. Waterman*) the Board itself has already found in favor of Flotill. The *Engelhorn* and *Southern Wood Preserving* cases are discussed supra at pages 29-32.

Pages 20 to 23. The Board says the grant of a closed shop in 1946 was unlawful assistance to the A. F. L. Here again the Board argues as though the 1946 memorandum gave the A. F. L. something new, but that simply isn't the fact. On page 21, the Board says:

"How much more corrosive of that freedom (of choice) is the imposition upon the employees of a *new* closed shop contract during such a critical period." (Italics Board's.)

A closed-shop status continuous from 1941 is not new when reaffirmed in 1946.

The Board says that this memorandum enabled the A. F. L. to "pick and choose the electorate in the forthcoming election by preventing the employment of its opponents, by compelling all employees to join its ranks, and by holding 'in terrorem of discharge' those employees who supported its rival in the pre-election campaign." (Board's Brief, pp. 20-21.) That is not true, and the Board knows it. Under the Rutland Court doctrine, 44 N.L.R.B. 587, 46 N.L.R.B. 1040, initiated by the Board and approved by this Court, *Local 2880 v. N.L.R.B.*, 158 F. (2d) 365, an

employer cannot, even under the closed shop contract, discriminate against an employee because of the latter's advocacy at, or near, election time, of a union other than that holding the closed shop. The employee can be as extravagant as he cares to be on behalf of the "out" union and the employer cannot use a loss of union membership resulting therefrom as grounds for dismissal if there is reason to believe that the loss of membership was precipitated by the activity on behalf of the contesting union.

Furthermore, the electorate was shaped by the substantive provisions of the C. P. & G. contract itself, which the parties retained in effect and which the Board expressly sanctioned. (R. 59.) The "Green Book" contract provides a rather complete seniority system. Section 9 of the "Green Book" (FTA-CIO Exhibit 2, at pages 16-18, R. 307) requires an employer to fill all jobs and do all rehiring from persons on a seniority list. Inasmuch as the seniority list had been built up over a period of years the electorate was largely frozen as a result of the closed-shop contract which was unquestionably valid even as late as February 28, 1946. It would be a grievous error to say that either Flotill or the A. F. L. had any material opportunity to shape an electorate in 1946. Between the Green Book contract and the Rutland Court principle the employer was powerless to interfere, and without employer assistance the A. F. L. could compete for favor only upon terms which at the most were no more favorable than those available to the C. I. O.

Pages 23 to 27. The Board says that an inconclusive election did not operate to restore majority status to the A. F. L. We do not contend that it did. We contend that in order to void utter industrial anarchy the status quo of necessity should be maintained until the Board affirmatively finds that the A. F. L. lost its majority. The major portion of the Board's argument on this subject has been discussed earlier in this brief, and will not be repeated here.

On page 24 the Board says: "The question of whether the A. F. L. still commanded the requisite majority was raised by the C. I. O. through the appropriate statutory procedure. . . ." This is not a correct statement. The representation proceeding was initiated by the independent Cannery and Food Process Workers Union, Stockton area, and the Board expressly found that even at the conclusion of the hearing the C. I. O.'s showing of representation at Flotill was not substantial. (R. 29.) The record gives no indication as to the fate of the Independent or the circumstances under which the C. I. O. entered the proceeding at Flotill.

At page 26 the Board says that the returns of the first election "showed that a majority of the employees did not favor either union." This, again, is not correct. The election returns showed (R. 67) that of the 205 valid votes counted by the Board, the A. F. L. received 105, or a clear majority. Twenty votes were challenged. The Regional Director recommended that challenges as to five employees be upheld, leaving 15 valid ballots in addition to those

already counted. (R. 359-64.) Had these been counted the total valid votes would have been 220, and if the A. F. L. had received but six out of the additional 15 it would have received a majority of all votes cast. This shows just the opposite of the statement of the Board that a majority of the employees favored neither union. However, for reasons never disclosed to respondent the Board declined to count the challenged ballots.

The Board says, at page 26-27, that "by recognizing the A. F. L. in the face of a pending representation proceeding before the Board, respondent, far from complying with its obligation under 'the Act, arrogated to itself the function of determining the question of majority status, 'which Congress entrusted to the Board alone' ". If the determination of majority status is "entrusted to the Board alone" then it was wrong for Flotill to recognize the A. F. L. as exclusive bargaining agency in 1939. Obviously the Act does not purport to bar the parties from determining these questions independently of the Board, as long as no unfair labor practice is committed in the establishment of majority status. Furthermore, the Board has approved the exclusive recognition had by the A. F. L. in 1945; if such recognition was lawful at the time of the first election in October, 1945, what makes it unlawful in 1946?

Pages 27 to 37. The Board argues that the doctrine of this case is not inconsistent with the policy of stability of bargaining relationships. We agree with the Board that the policy of the Act is to guarantee to

employees the right to bargain through representatives of their own choosing, and that is precisely what the employees did here. They chose the A. F. L., and they were entitled to bargain through the A. F. L. until a proper showing was made that a different union had been selected.

The Board's argument in this case is founded upon a false premise: The Board assumes that in 1946 Flotill gave the A. F. L. a standing it had not previously enjoyed in the plant. As we have seen, that was not the fact. Indeed, the Board erred in its observations in the Supplemental Decision and Order of February 15, 1946 (65 N.L.R.B. 1058) where it stated that the old contract would come to a close on March 1, 1946; the basic Green Book contract had been automatically renewed by failure of the parties to take steps to terminate it in December, 1945, and the supplemental closed shop agreement of 1941 was automatically renewed on January 30, 1946, for the same reason. When the Board issued its Supplemental Decision the contract had therefore been frozen until March 1, 1947.

The Board argues that certain supplemental matters added to the record are not material. We respectfully submit that they are highly pertinent, however, as they demonstrate pretty conclusively the viciousness in the practical operation of the Midwest Piping doctrine to this case. It is difficult to see how the Board can claim that there is no interference with the stability of bargaining relationships when the application of the Board's rule would have meant

a complete denial of effective bargaining from March 1, 1946, to January 20, 1948, and for as long thereafter as the Board would have failed to certify the bargaining agency. The record speaks all too plainly on this issue.

Other matters in this part of the Board's Brief have already been fully discussed.

CONCLUSION.

The sole issue before this Court is whether Flotill should maintain the status quo in its bargaining relations pending final resolution of a representation issue initiated by a petition now dismissed filed by a union now defunct. No doubt the Board anticipated that its first elections of October 1945 would lead to a prompt and conclusive determination of the rights and obligations of all the parties, and on this premise the Board recognized the propriety of maintaining the status quo until March 1, 1946. Solely because of its own administrative errors, however, the Board failed to perform its statutory function in this regard, with the result that when March 1, 1946 arrived the Board's self-reversals had made the issues more complex than ever. The Board thereupon determined to place Flotill in the impossible situation already discussed at length, and asks this Court to aid the Board in preventing Flotill from following the only course which was realistic, and, we believe, proper under the Act.

For the reasons heretofore stated we submit that Flotill was not only entitled to maintain existing conditions—it was obligated to do so by law. This Court should therefore deny enforcement of the Board's order.

Dated, June 25, 1948.

J. PAUL ST. SURE,
EDWARD H. MOORE,
JEFFERSON E. PEYSER,
Attorneys for Respondent.

(Appendix Follows.)

Appendix.



Appendix

PORTION OF DECREE OF JULY 15, 1940, IN NATIONAL LABOR RELATIONS BOARD v. BERCUT-RICHARDS PACKING CO., ET AL., NO. 9499, CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

AND IT IS FURTHER ORDERED THAT:

1. Respondent, Bercut-Richards Packing Co., its officers and agents, successors and assigns, shall cease and desist from:

(a) Discouraging or encouraging membership in any labor organization of its employees, by discharging or refusing to reinstate any of said employees, or in any manner discriminating with respect to their hire or tenure of employment or any term or condition thereof because or on account of their membership in, activity on behalf of or sympathy toward any such labor organization;

(b) Urging, persuading, warning or coercing its employees to join or not to join any labor organization of said employees, or threatening said employees with discharge if they join or fail to join any such labor organization;

(c) Interfering with the formation or administration of any labor organization of its employees, or contributing financial or other support thereto;

(d) In any manner interfering with, restraining or coercing its employees in their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act.

2. Respondent, Bercut-Richards Packing Co., its officers and agents, successors and assigns, shall take the following affirmative action to effectuate the policies of the National Labor Relations Act:

(a) Require that its officials, superintendents and employees having authority to hire or discharge do not in any way urge, persuade, warn or coerce its employees, or any of them, or in any manner influence or attempt to influence said employees to form, join, assist or participate in any labor organization, or not to form, join, assist or participate in any labor organization;

(b) Take all reasonable steps and precautions to carry out and effectuate the provisions of Paragraph 2 (a) above;

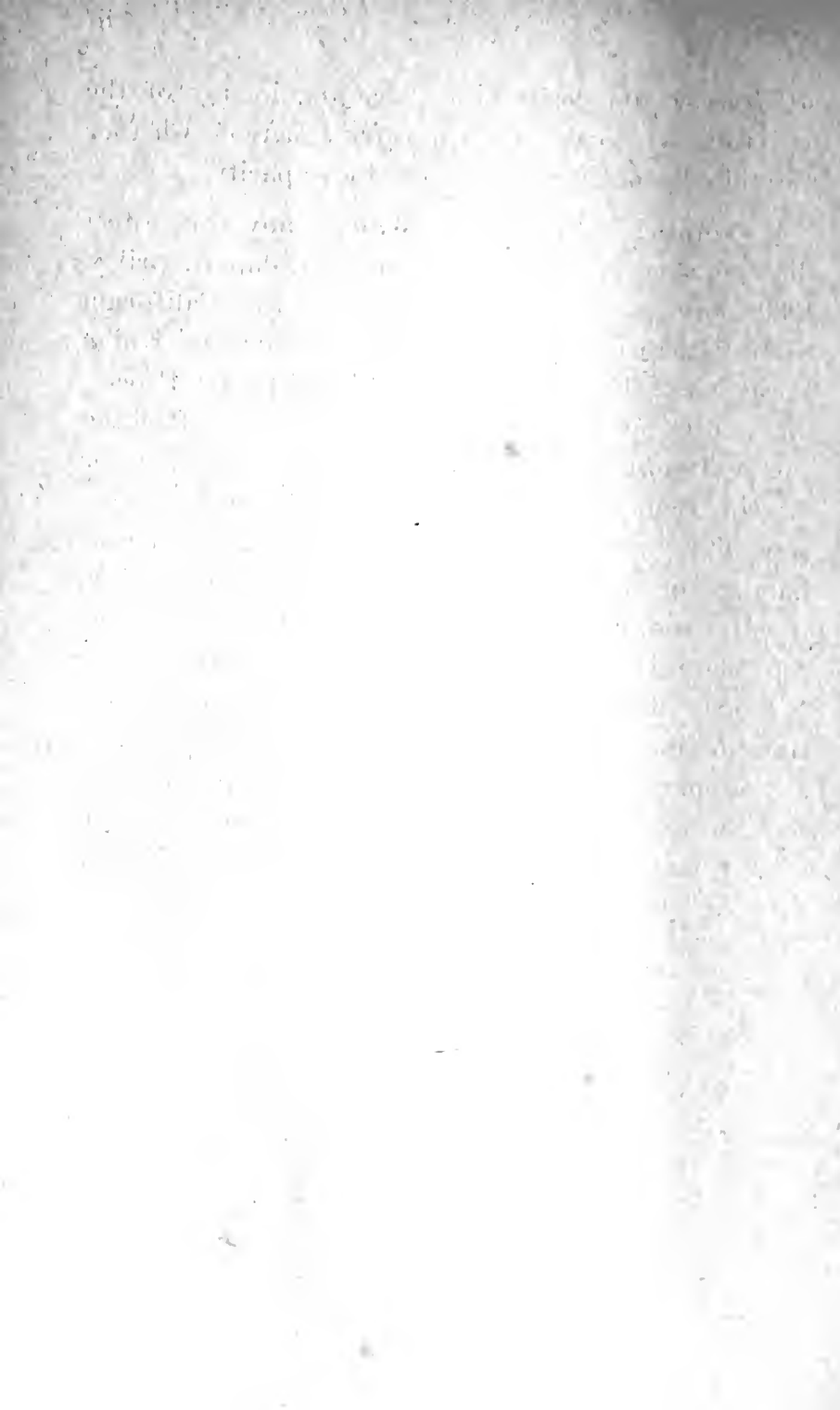
(c) Post, and maintain continuously from the date of this Order to and including August 15, 1940, at a conspicuous place in each department of its plant at Sacramento, notices containing a true and correct copy of this Order;

(d) Notify the Regional Director for the Twentieth Region within ten (10) days the steps respondent has taken to comply with this Order.

3. Respondent, California Processors and Growers, Inc., its officers and agents, successors and assigns,

shall cease and desist from engaging in any of the activities set forth in Paragraph 1 hereof, whether individually or in a representative capacity.

4. Nothing in this Order shall in any way affect the operation of that certain contract, dated April 4, 1939, now in force and effect between the California State Federation of Labor, Cannery Workers' Union Local No. 20324, A. F. of L., and California Processors and Growers, Inc., and Bercut-Richards Packing Co. and nothing in this Order shall impose upon Bercut-Richards Packing, or the California Processors and Growers, Inc., any obligation, restriction, liability or disability, whether affecting their right to enter into collective bargaining contracts with any representatives of their employees as provided in the National Labor Relations Act, as construed from time to time by Courts of competent jurisdiction, or any other right, or otherwise, except as provided in the National Labor Relations Act, or in the event of any amendment of said Act, then as provided in said Act as amended.



No. 11449

**In the United States Court of Appeals for the
Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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PAUL P. O'BRIEN,

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In the United States Court of Appeals for the Ninth Circuit

No. 11449

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLOTILL PRODUCTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. Summary of the Board's position

In view of various statements in the briefs of respondent and the A. F. L., it seems pertinent to summarize here the Board's position with respect to the so-called *Midwest Piping*¹ rule which the Board has applied in this case.

The rule is that when an employer knows that a question concerning the representation of his employees is pending before the Board, he may not lawfully make a new contract, or extend or renew an existing contract with a union, whether the contract provides merely for exclusive recognition of the union, or for a closed shop. The *Midwest Piping* case, *supra*,

¹ *Matter of Midwest Piping & Supply Co., Inc.*, 63 N. L. R. B. 1063.

Matter of Phelps Dodge Copper Products Corporation, 63 N. L. R. B. 686, 687; National Labor Relations Board, *Tenth Annual Report* (Gov't Print. Off., 1946), pp. 38-39; *Eleventh Annual Report* (1947), pp. 35-36; *Twelfth Annual Report* (1948), p. 26.

Where, in such circumstances, an employer does enter into an exclusive recognition contract with a union, he contravenes the requirements of the Act by aborting the procedure established for the ascertainment of the employees' free choice, and thereby interferes with the exercise of their right to make their own unhampered selection. As the Board stated in its *Tenth Annual Report*, *supra*, p. 39, the basis for the *Midwest Piping* rule is as follows:

Congress has clothed the Board with the exclusive power to investigate and determine bargaining representatives. Consequently an employer may not disregard the jurisdiction of the Board and preclude the holding of an election under Board auspices, by resolving the conflicting representation claims on the basis of proof which the employer deems sufficient but which is not necessarily conclusive. Moreover, the effect of such conduct is to accord unwarranted prestige and advantage to one of two competing labor organizations and thereby prevent a free choice by the employees.

Where, as in the instant case, the Board finds that an employer has violated Section 8 (1) of the Act, within the meaning of the *Midwest Piping* rule, it seeks to remedy the unlawful assistance to the recognized union and interference with the employees'

free choice of representatives, by requiring the employer to withhold exclusive recognition from the union, unless and until the union is certified by the Board. Of necessity the remedy also requires that the employer cease giving effect to its exclusive recognition contract with the assisted union. Where, as here, the contract provides, not merely for exclusive recognition, but also for a closed-shop, the impact of the employer's interference and assistance is aggravated but the applicable principle under discussion remains the same. *Eleventh Annual Report, supra*, pp. 36-37.

The specific question before the Court is whether the Board's *Midwest Piping* rule, as applied in the instant case, represents a reasonable, and therefore valid, accommodation of conflicting interests to the effectuation of the basic purpose and policy of the Act.² We submit that it does and that we have so demonstrated in our main brief. However, we believe certain arguments and assertions made by respondent and the A. F. L. in their briefs, and not anticipated in the Board's main brief, require reply.

As the Board has observed (R. 76-77) the rule itself is not founded upon novel concepts. It is

² Compare this Court's observation in *Local 2880 v. N. L. R. B.*, 158 F. 2d 365, 368, certiorari granted, 331 U. S. 798, and dismissed on motion of petitioner, 332 U. S. 845, that the Board's interpretation and application of the terms of the proviso to Section 8 (3) of the Act to the fact situation there presented, "is so obviously rational that we well could be required to accept it under the rule that upon 'questions of law the experienced judgment of the Board is entitled to great weight.' *Medo Corporation v. N. L. R. B.*, 321 U. S. 678, 681."

founded upon the basic and well settled proposition that in a contest between unions for the role of exclusive bargaining representative of his employees, an employer is bound by the Act to refrain from bringing the weight of his economic power to bear in favor of one union as against another.³ The net effect of the *Midwest Piping* rule is that the Board, after weighing the competing factors in favor of the policy of protecting employees' freedom of choice on the one hand, and in favor of a policy of stability on the other, came to the conclusion, as it did also in the *Local 2880* case, *supra*, enforced by this Court, that the factors in favor of freedom of choice outweighed those in favor of stability in the given circumstances. The Board concluded that where an employer knows than an unresolved question is pending before the Board concerning which of two competing unions the employees desire as their bargaining representative, and, nevertheless, grants exclusive recognition to one of these unions, he has, in effect, taken the choice out of his employees' hands and made his own choice for them, and that the harm flowing from such invasion of the employees' freedom of choice outweighs any competing advantage of stability which the employer and the favored union may advance to justify it.

Certainly, the underlying philosophy of the Act, as originally passed and as amended, which is to the

³ That, of course, is what we have reference to in the discussion in our main brief (p. 10) of an employer's duty of neutrality. We are not concerned with the mere expression of views, arguments, or opinions embraced in the protections of the First Amendment and Section 8 (c) of the Act, as amended.

effect that the stability of relations to be achieved by collective bargaining should be founded upon the free choice of representatives by employees, rejects the stability which is built upon the precarious foundation of the denial to employees of a freedom of choice. That is the basic reason underlying the judicial affirmation and approval of the Board's power to invalidate contracts with unions found to be employer dominated,⁴ or assisted,⁵ and of the Board's power to invalidate contracts made even with majority representatives when used to repress employees in the exercise of the freedoms guaranteed them by the Act.⁶

The initial responsibility for weighing these competing factors lies with the Board. The Board came to its conclusion after careful deliberation, and after according full weight to the conflicting considerations involved. Certainly, a conclusion calculated to protect the basic freedoms guaranteed by the Act should not, as the employer and the A. F. L. here seek to have the Court do, be lightly set at naught.

2. The contention that respondent did no more than maintain the status quo in its relations with the A. F. L., and that the Board could not properly find such conduct violative of the Act

Respondent's major contention appears to be that it did no more than maintain the *status quo* in its relations with the A. F. L., after the Board's admo-

⁴ *N. L. R. B. v. Pacific Greyhound Lines*, 303 U. S. 272.

⁵ *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652 (C. C. A. 9); *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72.

⁶ *Wallace Corporation v. N. L. R. B.*, 323 U. S. 248; cf. *Local 2880 v. N. L. R. B.*, *supra*.

nition in its supplemental decision of February 15, 1946, in *Matter of Bercut-Richards Packing Co. et al.*, 65 N. L. R. B. 1052, that none of the employers there concerned should, pending a new election, give preferential treatment to any of the labor organizations involved (R. 58-59). Respondent contends, further, that the Board could not properly find that mere maintenance of the *status quo* which, it says, meant simply continuing to recognize the A. F. L. as the exclusive representative of respondent's employees, and the renewal or extension of its closed-shop contract with the A. F. L., constituted preferential treatment of the A. F. L., and unlawful interference with its employees' rights under the Act (Resp. Br., pp. 12, 17-18, 23, 37-39, 60-64).

But this is the very thing the Board indicated, in the Supplemental Decision referred to, that respondent could *not* do. The Board recognized the right of the employers involved in the *Bercut-Richards* case to carry out their current collective agreements to their expiration date⁷ but stated that "none of the unions is entitled to an exclusive status as the bargaining agent after that date" (R. 58-59).

⁷ Respondent's contention that the Board's recognition of this right renders the *Midwest Piping* rule "inconsistent" is without merit (Resp. Br., pp. 33, 37-39). As we have noted, the rule itself, represents a balancing of interests which arise from the sometimes conflicting aims of the Act to secure the employees' freedom of choice of representatives and, at the same time, to promote stability of the bargaining relationship. The Board's determination that the freedom-of-choice principle should not be accorded unrestrained effect certainly does not make unreasonable or inconsistent the determination that the stability principle must also be subjected to some limitations.

Respondent apparently concedes that the *Midwest Piping* rule would be valid if its application were limited to cases in which the employer, while a representation question is pending before the Board, grants an exclusive recognition contract to a union when no union has been so recognized by the employer before (Resp. Br., p. 38). Respondent agrees that such "a contract would confer a standing upon the newly recognized union which it did not have before, and would be taken by the employees within the bargaining unit to demonstrate a preference by the employer for the union so favored" (Resp. Br., p. 17). Respondent, therefore, does not appear to challenge the validity of the basic principle upon which the rule is founded. Respondent, rather, challenges the propriety of the Board's application of the rule to the fact situation presented by the instant case.

But the line which respondent seeks to draw between a proper application of the rule, and an improper one, is exceedingly fine. The difference between the Board's position and respondent's, in this respect, is one of degree rather than principle. The whole point of the *Midwest Piping* rule is that the filing of a petition ordinarily places in doubt the majority status of any union claiming to represent the employees, whether it is an incumbent majority representative or a new claimant. The pendency of the representation question before the Board, therefore, calls with particular urgency for a hands off policy on the part of the employer. While it is true that the granting by an employer, during the pendency

of a representation proceeding, of exclusive recognition to a union which it has not theretofore recognized, may be more acute in its immediate impact than the same grant to a union with which he has theretofore had bargaining relations, the difference is one of degree only. In either case, the employer has acted to take the choice from out of the hands of the employees and has made it for them. In either case, the employer has snatched the subject matter of the controversy out of the hands of the tribunal which was constituted by law to resolve it, and substituted its own fiat for the will of the employees which was to be expressed before that tribunal through a free election. And in either case, the employer confers upon the recognized union the potent assistance which is inseparable from a grant of exclusive recognition. *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267.

The validity of the Board's *Midwest Piping* rule, and the propriety of its application herein, thus does not turn upon the question whether, following the Board's supplemental *Bercut-Richards* decision, respondent granted the A. F. L. rights it had not previously enjoyed, or merely maintained the *status quo* in its relationship with the A. F. L. If the rule itself is valid, and it is, then it applies regardless of whether respondent, on March 5, 1946, recognized and made a closed-shop contract with the A. F. L. for the first time, or merely renewed an existing contract. Respondent's contention that it did no more than

maintain the *status quo*, is entirely irrelevant, as is its extended discussion in proof of that assertion. However, since respondent contends that the Board incorrectly stated in its main brief that respondent did more than continue the arrangement which had theretofore existed with the A. F. L., we shall answer the contention briefly.

Respondent says that the Board's main brief is "misleading, particularly in omitting the crucial fact that for at least five years the respondent and the A. F. L. had been parties to a *closed-shop contract* and that the contract attacked in these proceedings was merely an extension or reaffirmation of that contract" (Resp. Br., p. 2), and that the Board's brief "incorrectly states 'that the employer had gone beyond the requirements of the old agreement' " (Resp. Br., p. 8).

The Board made no finding that respondent had maintained a closed-shop agreement with the A. F. L. for five years prior to March 1946. The Board did find, however, that "At least the contract expiring March 1, 1946, between the A. F. L. and respondent included a closed-shop provision" (R. 87, 95). The closed-shop provision referred to was contained in the supplemental agreement between respondent and the A. F. L. which embodied matters not covered by the Master Agreement (R. 87). Since the supplemental agreement expiring on March 1, 1946, is not in evidence (R. 87), it is impossible to determine on this record what difference there may have been be-

tween that agreement and the one executed by respondent and the A. F. L. on March 5, 1946, which is the contract here under attack (R. 127-129). But it is a fair inference that the terms of the two agreements were not identical. For if they were, why execute a *new* contract to maintain the *status quo* when the *status quo* is already maintained by virtue of the automatic renewal clause in the old contract? Respondent states that the supplemental agreement expiring March 1, 1946, automatically renewed on January 30, 1946, to run for another yearly term to March 1, 1947 (Resp. Br., p. 66). That respondent should have executed a *new* contract to supplant one which was already in effect by virtue of renewal, would indicate that something more than the *status quo* was intended and that something more was achieved.

Respondent's version of the facts, we submit, supports the statement in the Board's main brief that respondent entered into a *new* closed-shop contract with the A. F. L. on March 5, 1946, and that respondent was then "of his own accord" favoring the A. F. L. (Board's Main Br., pp. 21, 30-31). If respondent had been as intent upon merely maintaining the *status quo*, as it says it was, it would have allowed the contract, which it claims was then current, to run out its term until March 1, 1947.

3. The contention that the cases cited by the Board do not support its position

Respondent contends (Resp. Br., pp. 28-32) that *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F.

2d 606 (C. C. A. 5), and *N. L. R. B. v. John Englehorn & Sons*, 134 F. 2d 553 (C. C. A. 3), cited by the Board at page 18 of its main brief, do not support the Board's position. A brief analysis of these decisions demonstrates that the contrary is true.

In the *Southern Wood Preserving* case, *supra*, one of the factors which entered into the Court's decision upholding the Board's finding of unlawful interference and assistance on the part of the employer was the latter's "premature signing of a new contract" with one union, while a rival union's petition for certification was pending before the Board (135 F. 2d, at p. 607). In this respect, we submit, the case is clearly analogous to the instant case and supports the principle upon which the Board's decision herein rests. That the different facts in the *Southern Wood Preserving* case called for a remedial order different from the order herein (Resp. Br., pp. 31-32), does not destroy the analogy.⁸

⁸ In the *Southern Wood Preserving* case the employer contracted with the A. F. L. while a C. I. O. petition for certification was pending. When the C. I. O. subsequently won a Board election, the employer abandoned the A. F. L. and contracted with the C. I. O. The Board's order did not require the employer to cease bargaining with the assisted A. F. L. or giving effect to its A. F. L. contract, because at the time of the order the employer had neither bargaining relations nor a contract with the A. F. L. The Board's order, *inter alia*, required the employer to cease interfering with its employees' exercise of their organizational rights. In enforcing the order the Court observed that the signing of the contract with the C. I. O., following the employer's unlawful assistance to the A. F. L., did not make the order moot, since there "is no certainty that the rivalry between the unions is dead, or that the Company will not again take sides" (135 F. 2d, at p. 607).

In the *Engelhorn* case, *supra*, while a C. I. O. petition for certification was pending before the Board, the employer made a closed-shop contract with the A. F. L., with which it had had an exclusive bargaining contract for approximately the past three years (134 F. 2d, at p. 555). The Board found that this conduct, as well as other conduct by the employer, constituted interference in violation of Section 8 (1) of the Act and the Court declined to pass on this point specifically (*id.*, at p. 556). The Court enforced the Board's order requiring the employer, *inter alia*, to cease giving effect to its closed-shop contract with the A. F. L., on the ground that the Board had properly found that the employer had unlawfully assisted the A. F. L. by various acts prior to the execution of the contract. Since the contract was thus made with an improperly assisted union, it was held invalid under the proviso to Section 8 (3) of the Act (*id.*, at p. 556). After reciting numerous other acts of assistance, however, the Court declared that, "the quick execution of the closed shop agreement, at a time *when the employer knew of claims by another labor organization that it represented a majority of the employees, is itself* evidential of assistance to the contracting union" (*ibid.*). [Italics supplied.] We submit, therefore, that the *Engelhorn* case supports in principle the proposition for which the instant case stands.

4. The contention that the Board's *Midwest Piping* rule is arbitrarily applied

Respondent cites three recent decisions of the Board which it says demonstrate that the *Midwest Piping* rule stands for an arbitrary principle which is arbitrarily applied by the Board and is, therefore, improper (Resp. Br., pp. 19-28). See also the A. F. L.'s Brief, at pp. 26-35. The three cases are *Matter of Ensher, Alexander & Barsoom, Inc.*, 74 N. L. R. B. 1443; *Matter of Ellis Canning Company*, 76 N. L. R. B. 99; and *Matter of Eaton Manufacturing Company*, 76 N. L. R. B. 261. Basically respondent's complaint is that, since the Board did not apply the *Midwest Piping* rule to the facts involved in these three cases, it should not have applied it in the instant case. The three cases in question, we submit, are clearly distinguishable.

The Board found the *Midwest Piping* rule inapplicable to the *Ensher, Alexander & Barsoom* case because, at the time the company executed its contract with the A. F. L. in that case, the only rival union involved, an independent, had become defunct, and there was no other claim that the A. F. L. did not, in fact, represent a majority of the employees. The A. F. L. was the only union seeking recognition as the employees' representative at the time the employer granted it such recognition. As the Board found, there were "no actual conflicting claims" and there was "in actual fact no real question concerning representation of the respondents' employees to be resolved" (74 N. L. R. B., at pp. 1444-1445).

We submit that the Board's reluctance to apply the *Midwest Piping* rule indiscriminately to the foregoing clearly distinguishable circumstances, does not render the rule arbitrary. Indeed, it more reasonably appears to demonstrate the contrary.⁹

It is to be noted that in the instant case, at the time it renewed its contract with the A. F. L., respondent had been informed officially by the Board that a representation question existed, and had been admonished by the Board not to grant exclusive recognition to any union pending a new election (R. 58-59).

In *Matter of Ellis Canning Company*, 76 N. L. R. B. 99 (cited, Resp. Br., pp. 21-23), the facts were entirely different from those in the instant case or in any case where the *Midwest Piping* rule would ordinarily apply. In the *Ellis Canning* case the C. I. O. filed a representation petition in the middle of the term of the company's closed-shop contract with the A. F. L. When the A. F. L. insisted upon enforcement of its closed-shop agreement, a number of employees were discharged because they refused to join the A. F. L. This, of course, is the normal manner in which a closed-shop agreement operates. An un-

⁹ Respondent's contention that the Board's direction of election at the *Ensher* plant, dated August 16, 1946, with both the C. I. O. and the A. F. L. on the ballot, shows that there was in fact a question concerning representation at the plant on February 27, 1946, when the contract with the A. F. L. was made (Resp. Br., pp. 20-21), is without merit. The C. I. O. claim did not arise until nearly six months after the execution of the contract with the A. F. L., as the Board specifically noted (74 N. L. R. B., at p. 1444, n. 4).

usual element in the case, however, was the fact that for approximately one year preceding the filing of the representation petition by the C. I. O., the company and the A. F. L. had, by mutual agreement, refrained from enforcing the closed-shop provision of their contract. This situation gave rise to the question whether, when enforcement of the closed-shop provision was resumed after the rival C. I. O. filed its representation petition, the company was violating its obligation to keep its hands off the representation controversy then pending before the Board.

The Board held that the fact that the company and the A. F. L. had voluntarily suspended the closed-shop provision of their contract did not mean that they had waived the right to enforce it thereafter if they so desired. Insofar as its enforcement may have marked a "departure from neutrality," as respondent states (Resp. Br., p. 23), it was a departure which the Act permitted by virtue of the valid closed-shop contract which ante-dated the raising of the representation question by the C. I. O. Since the contract, in terms, required the employees to belong to the A. F. L. as a condition of employment, the employees had no right under the Act to insist upon employment without fulfilling the required condition.

All the Board did in the *Ellis Canning* case was recognize that the parties had legitimate contractual rights and obligations which did not contravene the purpose and policy of the Act. Similarly, in the instant case the Board recognized that the parties had

a right to carry out the provisions of their contract which was in existence at the time the representation question arose (R. 58-59). In the instant case, however, unlike the *Ellis Canning* case, the employer not only carried out the existing contract to its termination but, thereafter, entered into a new contract for a new term, thus bringing the case within the *Midwest Piping* rule.

Matter of Eaton Manufacturing Company, 76 N. L. R. B. 261 (cited, Resp. Br., pp. 23-27), is not inconsistent with the instant case. In that case, as here, the employer executed an exclusive bargaining contract with the A. F. L. while a petition for representation, filed by the C. I. O., was pending before the Board. There, however, after the C. I. O. filed its representation petition, it also filed with the Board a charge alleging that the employer had engaged in unfair labor practices. Ordinarily, the Board, as a matter of policy, will not process a representation petition while unfair labor practice charges are outstanding, unless the charging union executes a waiver of its right to urge the unfair labor practices as objections to any election which may be held.^{9a} National Labor Relations Board, *Twelfth Annual Report*, *supra*, at p. 14. The C. I. O. did not waive its charges in the *Eaton* case and the Board therefore was unable to make a "prompt determination" of the representa-

^{9a} The rationale of this policy is that, otherwise, if the union lost it could object that its loss of adherents was due to the unfair labor practices, and ask the Board to set the election aside on that ground.

tion question raised by the C. I. O.'s petition, because of the necessity of determining the merits of the C. I. O.'s unfair labor practice charges. The Board subsequently found that the intervening unfair labor practice charges were "groundless."

In these circumstances, the Board held that the *Midwest Piping* rule was not properly applicable to the *Eaton* case. The basis for the Board's decision was that the petitioning union, by its own act of filing a meritless charge, was itself responsible for unjustifiably delaying the Board's determination of the representation question, and that it would not serve the Act's objectives to permit such meritless charges to form the basis for indefinitely suspending collective bargaining with a proper representative. Clearly, if one of two competing unions, having raised a representation question by filing a petition, were permitted, by the mere filing of a groundless unfair labor practice charge, to postpone indefinitely the Board's resolution of the representation question, and thereby to suspend indefinitely the normal operation of the collective bargaining process, the purpose of the *Midwest Piping* rule, and of the Act, would be defeated.^{9b}

We submit that the Board's recognition that an abuse of the *Midwest Piping* rule "can easily operate in derogation of the practice of continuous collective bargaining" (*the Ensher, Alexander & Barsoom* case,

^{9b} That decision does not imply, as respondent suggests (Resp. Br., p. 27), that the *Midwest Piping* rule is inapplicable *wherever* an abnormal delay occurs, regardless of the nature of the cause of the delay.

supra, 74 N. L. R. B., at p. 1445; *Twelfth Annual Report*, p. 26), and that therefore the rule is to be applied “with caution” (*ibid.*), as shown by the cases here under discussion, demonstrates the reasonableness and the soundness of purpose with which the Board has applied the rule.

5. The contention that the *Midwest Piping* rule is contrary to law

At pages 40 to 57 of its brief respondent argues that the Board’s *Midwest Piping* rule is contrary to law. The A. F. L. makes a similar argument at pages 39 to 57 of its brief. Both of these parties suggest that the net effect of the Board’s rule is to require the affected employer to bargain with two unions or several unions, instead of with one union as the Act contemplates. This is not an accurate representation of the effect of the Board’s rule. The rule, as we have seen, simply requires the employer to refrain from entering into a new exclusive bargaining or closed-shop contract, or from renewing an old contract beyond its current term, while a representation question is pending before the Board. The Board stated, in its Supplemental Decision in the *Bercut-Richards* case (R. 58–59), that the affected employers “may recognize each * * * [union] as the representative of its members” (R. 59). [Italics supplied]. But this does not mean, as respondent and the A. F. L. state, that the employer is *required* to recognize each competing union as representative of its own members. It is merely another way of stating

the degree of neutrality of action required of the employer pending the Board's disposition of the representation question, and means only that if he grants such recognition to one union, he must do so for any union claiming members in the unit.

We discuss below the cases which respondent and the A. F. L. contend show the Board's *Midwest Piping* rule to be contrary to law.

(a) *N. L. R. B. v. Pacific Greyhound Lines, Inc.*, 106 F. 2d 867 (C. A. 9)

The fact that the *Pacific Greyhound* case was a contempt proceeding places it in a posture entirely different from the instant case, which is an enforcement proceeding under Section 10 (e) of the Act. In the *Pacific Greyhound* case this Court said, "What we are to determine is whether there has been a contempt of our decree enforcing the Board's order. That is to say, whether what Greyhound did * * * is something of the same nature it was shown to have been doing in the proceeding leading to the Board's order * * * or whether it was something different in kind from that from which it was ordered to cease and desist" (106 F. 2d, at p. 870). The question in such a case then, is not the broad question of whether the Act has been violated, but the considerably narrower question of whether the employer has failed to comply with the terms of the court's decree. This Court's decision in the *Pacific Greyhound* case, therefore, was not whether the alleged conduct of the employer violated the Act, but whether it violated the Court's decree. Specifically, the Court held that the

alleged acts of the employer were "essentially different in kind from those raised in the proceeding in which our decree enforcing the Board's cease and desist order was granted," and, that, therefore, the Board's petition did "not allege facts constituting a contempt of this court * * *" (*id.*, at p. 871).

We submit, therefore, that insofar as the employer's modification or extension of a closed-shop contract while a representation question was pending before the Board, may have constituted part of the conduct alleged by the Board to have been in contempt of the Court's decree in the *Pacific Greyhound* case, the Court's decision stands only for the proposition that such alleged conduct was not related to the conduct from which the employer was ordered to cease and desist and was, therefore, not in contempt of the Court's decree. The decision cannot properly be taken as ruling upon the question whether such conduct constitutes a violation of the Act.

(b) *N. L. R. B. v. Bercut-Richards Co.* (C. A. 9), No. 9499, decided July 15, 1946

This *Bercut-Richards* case was also a contempt proceeding and the considerations we have just discussed with respect to the *Pacific Greyhound* case, *supra*, apply to it as well. The question before the Court was whether the conduct of the employers occurring in 1946 constituted a violation of the Court's decree entered upon consent of the parties. The consent decree enjoined the employers from engaging in certain proscribed acts of discrimination, coercion, and interference against their employees (Resp. Br., Ap-

pendix, pp. i-iii). The respondents in that case cited the earlier *Pacific Greyhound* case on the proposition that the 1946 occurrences were remote in time and not related to the conduct which culminated in the 1940 decree and, hence, were not encompassed by the decree. We submit that the fair construction to be placed, therefore, upon the Court's denial, without opinion, of the Board's petition to adjudge the employers in contempt in that case is that it was a reaffirmation of its doctrine in the *Pacific Greyhound* case, that a decree may not be construed to encompass later conduct, remote in time and not related to the conduct involved in the proceeding in which the decree was rendered.

We submit that the instant case presents an entirely different question, even though the essential facts which gave rise to the instant case are the same as those presented to the Court in the *Bercut-Richards* contempt case. In the latter case the Court did not have before it the "original consideration" of the Board (the *Pacific Greyhound* case, 106 F. 2d at p. 871), that the conduct in question constituted a violation of Section 8 (1) of the Act, without regard to any outstanding decree of the Court.

(c) *Consolidated Edison Company v. N. L. R. B.*, 305 U. S. 197, and *N. L. R. B. v. McGough Bakeries Corp.*, 153 F. 2d 420 (C. C. A. 5), enforcing, as modified, 58 N. L. R. B. 849

As pointed out in the Board's main brief (p. 28, n. 11), the *Consolidated Edison* case has no bearing upon the issue here. In the *Consolidated Edison* case the employer did not grant exclusive recognition

to one of the competing unions. It simply contracted with the union as representative of its members only (305 U. S. at p. 237). This type of recognition, as the Board has specifically stated in the instant proceeding (R. 59), is permissible under the *Midwest Piping* rule.

The *McGough Bakeries* case, *supra*, as pointed out in the Board's main brief (pp. 19-20, n. 9), did not involve an adjudication of the question presented here. In that case, the employer's granting a closed-shop contract to one of two competing unions while a representation petition was pending before the Board, was merely a circumstance but not a ground of decision. Invalidity of the contract was predicated solely upon the ground that, prior to its execution, the employer unlawfully assisted the union by various acts and failed to require proof of the union's alleged majority status (58 N. L. R. B., at pp. 851, 873). The Court was of the opinion that the Board's factual findings of assistance lacked support in the evidence, thereby undermining the foundation, in no way here involved, for the Board's conclusion of invalidity in that case. (153 F. 2d, at p. 425).

6. Board proceedings subsequent to the filing of its main brief

The representation proceeding bearing on this case is described, in part, at pages 3 to 6 of the Board's main brief. As part of that proceeding further elections were conducted by the Board on August 29 and 30, 1946, at the various plants involved, including respondent's plant. Upon objections filed by the

C. I. O., the Board made an extensive investigation of the conduct of the elections.

The investigation was not completed at the time the amendments to the Act became effective on August 22, 1947. On September 4, 1947, certain of the employers concerned filed a motion to dismiss the entire representation proceedings. Thereafter, on October 31, 1947, the A. F. L. filed with the Board a motion to dismiss the objections to the election and to certify the A. F. L. as the bargaining representative of the employees involved. On January 19, 1948, the Board heard oral argument on these motions. Counsel for the employers, the C. I. O., and the A. F. L., participated. On January 20, 1948, the Board issued an order dismissing the petitions for investigation and certification of representatives (see Appendix A, *infra*, pp 30-32). The basis for the Board's action was that the C. I. O. had not complied with the reporting and filing requirements of Section 9 (f), (g), and (h) of the Act, as amended (see Appendix B, *infra*, pp. 33-36), and that those portions of the Act precluded the Board from certifying, or investigating a representation question raised by a non-complying labor organization. *Matter of Rite-Form Corset Company, Inc.*, 75 N. L. R. B. 174; *Matter of Monumental Life Insurance Company*, 75 N. L. R. B. 776.

The A. F. L. contends (A. F. L. Br., pp. 43-44) that the dismissal of the petitions leaves the parties in *status quo*, as if the petitions had never been filed, and that, therefore, the *Midwest Piping* rule, which

turns upon the existence of the representation question raised by these petitions, is not properly applicable here. But this contention overlooks the fact that these petitions were valid when they were filed. They legitimately raised a representation question which existed, in fact, at the time respondent and the A. F. L. entered into their new contract on March 5, 1946. The question before the Court is whether the Board could properly find, as it did, that respondent's conduct in this respect unlawfully interfered with its employees' exercise of their freedom of choice of representatives. Certainly the fact that the Board subsequently was precluded from further processing of the petitions because of the C. I. O.'s disqualification by reason of the amendments to the Act cannot operate retroactively to deprive the employees of the protection to which the Act entitled them at the time respondent committed its interference.¹⁰ *N. L. R. B. v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. C. A. 2); *N. L. R. B. v. Mylan-Sparta Co., Inc.*, 166 F. 2d 485, 487-488 (C. C. A. 6). We submit that if the *Midwest Piping* rule is valid, the propriety of its application herein is not affected by the Board's dismissal of the petition which raised the representation question in this case.¹¹

¹⁰ Manifestly, the A. F. L.'s contention that if the Board is upheld here non-complying unions will be enabled to halt legitimate bargaining between employers and qualifying unions, is without merit (A. F. L. Br., p. 44). As the instant case demonstrates (*supra*, pp. 24-25), the Board will not investigate petitions by non-complying unions.

¹¹ It is true, as respondent states (Br., pp. 10, 64), that the representation petition involved herein was filed by the independent Cannery and Food Process Workers Union (R. 509-510).

N. L. R. B. v. Grieder Machine Tool & Die Company, 142 F. 2d 163 (C. C. A. 6), enforcing 49 N. L. R. B. 1325, certiorari denied, 323 U. S. 724, cited by the A. F. L. (Br., p. 43), is not in point. There a rival union sought to raise a representation question by filing a petition with the Board less than 3 months after the majority representative had been certified by the Board (142 F. 2d, at p. 165). The Board refused to entertain the petition on the ground that its recent certification of the nonpetitioning union was still in force and effect (49 N. L. R. B., at pp. 1344-1345). The employer was found to have violated the Act by refusing to bargain with the certified union both before and after the Board had rejected the rival union's petition. The Court held that, in view of the certification, the employer's "duty was to continue negotiations [with the certified union] and if it had any doubt as to its rights it might have resorted to the Board for clarification" (142 F. 2d, at p. 165). The instant case did not involve a recent

There is no question, however, as to the status and interest of the C. I. O. in the representation proceeding which followed the filing of the petition. That proceeding was consolidated with a large number of other similar proceedings which arose upon petitions filed by either the Cannery and Food Process Workers Union or the C. I. O. (R. 21-23). During the course of the hearing in the representation proceedings, the Board granted the motion of the C. I. O. to intervene in all proceedings in which it had not filed a petition. In its original decision and Direction of Election, following the hearing in the consolidated representation proceeding, the Board observed that the C. I. O. had made a showing of representation in all of the various units involved, with one exception (R. 28-29, notes 9 and 10), and accorded the C. I. O. a place on the ballot in all of the elections except that one (R. 28-29, notes 9 and 10, 34-35, 45-47).

certification by the Board which had not yet had a reasonable chance to operate. Respondent and the A. F. L. had enjoyed an extended bargaining relationship and there is no question but that the period was appropriate for entertaining a petition to determine the employees' choice of representatives. The Board had so determined in the representation proceeding and had informed respondent, in no uncertain terms, as to the impact of the pending representation question upon its bargaining rights and obligations (*supra*, pp. 5-6).

The *Grieder* case is simply one of a number of cases in line with the Board's settled policy of holding that the certification of a union as bargaining representative, or a union's execution of a valid contract recognizing it as exclusive bargaining representative, entitles the union and the employer to a period of stability during which the union's representative status is not subject to attack. During such stability period, which usually extends either for about a year in the case of a certified union without a contract, or for the major part of the term of the contract, where one exists, the Board will not entertain a petition for investigation of representatives. *Matter of Kimberly-Clark Corporation*, 61 N. L. R. B. 90, 92-93; *Matter of Leo Hart Co., Inc.*, 26 N. L. R. B. 125, 127-129; *Matter of Detroit and Cleveland Navigation Co.*, 29 N. L. R. B. 176, 178-180; the Board's *Twelfth Annual Report*, *supra*, at pp. 13-14. Cf. *N. L. R. B. v. Century Oxford Mfg. Corp.*, 140 F. 2d 541 (C. C. A. 2), certiorari denied, 323 U. S. 714.

The Board has been mindful, however, that its stability policy should not be applied so rigidly as to

encroach unduly upon the employees' right to choose and change their representatives. To this end the Board has recognized that during a "reasonable" period prior to the end of a contract term the employees, although bound to the contracting union as their exclusive representative for the entire contract term, may raise a representation question for the purpose of making a new determination of representatives for the period following the term of the current contract. Depending upon the circumstances of the case, such "reasonable" period may be as much as the two or three months preceding the termination date of the contract. *Matter of Clark Bros. Co., Inc.*, 66 N. L. R. B. 849, 851; *Matter of the Flintcote Co.*, 55 N. L. R. B. 1442, 1443; *Matter of Chrysler Motor Parts Corp.*, 38 N. L. R. B. 1379, 1381; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587, 589; the Board's *Twelfth Annual Report*, *supra*, at pp. 9-10.

The *Midwest Piping* rule, as we have seen, is applied by the Board in keeping with these reasonable principles which the Board has established in the administration of the employee-representation provisions of the Act.

Respectfully submitted.

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

MARCEL MALLET-PREVOST,
Attorney,
National Labor Relations Board.

NOVEMBER 1948.

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 20-R-1414, et al.

In the Matter of BERCU-T-RICHARDS PACKING COMPANY,
ET AL., and CANNERY AND FOOD PROCESS WORKERS
COUNCIL OF THE PACIFIC COAST AND ITS AFFILIATED
UNIONS: FOOD, TOBACCO, AGRICULTURAL AND ALLIED
WORKERS UNION OF AMERICA, CIO

ORDER DISMISSING PETITIONS

Upon petitions duly filed, the National Labor Relations Board, herein called the Board, conducted elections on August 29 and August 30, 1946, among employees of California Processors and Growers Inc., herein called CP&G, and among employees of independent companies involved, to determine whether the employees in the several units desired to be represented by the Petitioner, Food, Tobacco, Agricultural and Allied Workers of America, CIO, or by California State Council of Cannery Workers Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, the Intervenor herein, for the purposes of collective bargaining, or by neither.

At the close of the election in the CP&G unit, a Tally of Ballots was furnished the parties. The Tally showed that of 31,832 valid votes cast, 14,896 were cast for the Petitioner; 16,262 were cast for the Inter-

venor, 674 were cast for neither labor organization, and 2,056 were challenged ballots.

On September 9, 1946, the Petitioner filed objections to the conduct of the elections, with the exception of those elections which had been conducted among the employees of certain of the independent companies.¹

Thereafter, upon a motion filed on July 31, 1947 by the Regional Director of the Board for the Twentieth Region suggesting procedural steps to be taken on these proceedings, and upon motions severally filed by the CP&G on September 4, 1947, requesting that the motion of the Regional Director be denied and that these proceedings be dismissed, and by the Intervenor on October 31, 1947, requesting that the objections to the election be dismissed and that the Intervenor be certified as the bargaining representative, a hearing for the purpose of oral argument was held before the Board on January 19, 1948 at Washington, D. C. The Companies, the Petitioner, and the Intervenor appeared by counsel and presented argument.

The Board has considered these motions and the oral argument. It is clear, in view of the objections and challenges, that the results of the elections are inconclusive, and that further investigation by the Board would be required to make such elections determinative. The Petitioner has failed to comply with the filing requirements of Section 9 (f), (g), and (h) of the Act. The Board is, accordingly, precluded from continuing any investigation of these

¹ Of the elections among employees of the independent companies, some were conclusive and resulted in the issuance of Board certifications before August 22, 1947. The remaining independent elections are in the same posture as that of the election in the CP&G unit because of objections filed by the Petitioner herein.

questions concerning representation.² The proceedings must therefore be dismissed.

ORDER

IT IS HEREBY ORDERED that the petitions for investigation and certification of representatives filed by the Petitioner with respect to employees of California Processors and Growers Inc., and the independent companies involved herein, wherein no certification issued before August 22, 1947, be and they hereby are dismissed.

By order of the Board:

Signed at Washington, D. C., this 20th day of January 1948.

FRANK M. KLEILER,
Executive Secretary.

² See *Matter of Rite-Form Corset Company, Inc.*, 75 N. L. R. B., No. 14; *Matter of Monumental Life Insurance Company*, 75 N. L. R. B., No. 93.

APPENDIX B

Pertinent portions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised

by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowance for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f)

authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefore;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor

organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

9454 + 2455

No. 11,449

IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

FLOTELL PRODUCTS, INC.,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

J. PAUL ST. SURE,

EDWARD H. MOORE,

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Financial Center Building, Oakland 12, California,

Attorneys for Respondent.

FILE

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PAUL P. O'BRIEN, -

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No. 11,449

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

This brief, pursuant to this Court's order of December 15, 1949, will be limited to a discussion of the effect on the present case of the Supreme Court's decision in the *Colgate-Palmolive-Peet* case.

In respondent's brief herein we argued at length that the Board's "cease bargaining doctrine", which it applied in this case, is neither required nor permitted by the language of the law; in fact, it is contrary to law. The *Colgate* decision of the Supreme Court is in our view a logical development from the *Consolidated Edison* case discussed at pages 46 to 49 of our brief, where the Supreme Court strictly limited the Board's asserted right to invalidate contracts with independent labor organizations.

The Board in the *Colgate* case decided that there was a conflict between the rights guaranteed employees in Section 7 and the permission in Section 8 (3) to make a closed shop contract. The Board resolved the conflict by giving preference to Section 7 and disregarding the Section 8 (3) proviso.

In the *Flotill* case the Board found a conflict between the guarantees of Section 7 and the stability of collective bargaining relationships, which is the principal objective of the law. This objective was accomplished in the Wagner Act through protection of the right of employees to select a collective bargaining agent and by requiring employers to bargain with a majority union. The Board in our case again resolved this conflict by giving preference to the employees' "freedom of choice" (Board's reply brief, pp. 3 and 4) disregarding the policy of stability.

The proviso to Section 8 (3), subordinated by the Board in the *Colgate* case, *permitted* making a closed shop contract. The stability principle subordinated in the *Flotill* case is enforced by the requirements of Section 8 (5), that an employer *must* bargain with the majority union and he must reduce to writing and sign the agreement reached. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514.

The Board may no more invalidate a contract negotiated as required by Section 8 (5) than it may ignore the closed shop contract negotiated as permitted by Section 8 (3) merely because of the presumed conflict with rights guaranteed to employees by Sec-

tion 7 to change their collective bargaining representative.¹

The employees are free to change their bargaining agent, but until they do, the closed shop contract, validly negotiated, must be observed; and, until they do, the employer must observe his obligation to bargain with the majority union with which he has bargained in the past. It should be emphasized that the Board did not allege or try to prove in this case that the A. F. of L. did not represent a majority. The Board presumed that it did not, merely because of the pendency of a petition to change the bargaining agent. The law does not so provide. If, in fact, the A. F. of L. did not represent a majority, the burden was upon the Board to allege that it did not and to prove that it did not.²

¹The Board was not prevented by the contract from holding an election. The Board could hold an election (as it did) and the employees were free to vote (as they did). The Board applies no general rule that a fair election is dependent upon the absence of a contract. The Board conducts thousands of elections while contracts are in force and while closed shop contracts are in force. One of the problems which occurs often before the Board is the question of whether or not the Board should direct an election because of the existence of a contract, and the Board has developed a complicated body of law as to when an existing contract will or will not bar an election. Despite the contract, the Board could make sure that the election would be fairly conducted, and it could prevent any unlawful interference by the employer; but the Board could not go beyond the law and prohibit as interference what the law not only does not prohibit, but requires.

²The employer could not object if the Board alleged and proved that it contracted with a minority union. The Board made no effort to allege or to prove that the A.F. of L. did not represent a majority. As far as the Board is concerned, it would make no difference if the A.F. of L. represented 99% of the employees. The Midwest Piping Doctrine forbids bargaining so long as the Board has not yet determined the bargaining representative desired by a

The language used by the Supreme Court in the *Colgate* case is in a large part applicable *mutatis mutando* to the present case. For convenience, the portions we consider significant are set out below, with our comment appearing in the right hand column:

Quote	Comment
1. "There is no question but that the discharges had the effect of interfering with the employees' right, given by Sec. 7 of the Act, to self-organization and to collective bargaining through representatives of their own choosing. Nor is there any question but that the discharges had the effect of discriminating, contrary to the prohibition of Sec. 8 (3), in the tenure of the employees."	In this case, there is no evidence whatsoever that the continuance of bargaining with the A.F. of L. actually interfered with employees' rights at all. The Board presumes, without evidence, that "agitation for a change in bargaining representatives" converted the continued recognition of the A.F. of L. into an unfair labor practice, because, presumably, the A.F. of L. could not represent the majority.
2. "The claimed impotency of the contract as a defense here rests not upon any provision of the Act of Congress or of state law or the terms of the contract, but upon a policy declared by the Board. That policy has for its avowed pur-	The same alleged conflict exists in this case. The Board says (brief, p. 3) that the Midwest Piping Doctrine "represents a reasonable and therefore valid, accommodation of conflicting interests to the effectuation of the basic purpose

majority of the employees. The Board therefore makes a *Board* conclusion that the A.F. of L. represented a majority, a condition precedent to bargaining. The law requires only that the A.F. of L. *actually* represent a majority. The employer who bargains while the Board is determining the majority representative assumes the risk. If another union is certified, he must bargain with it; but the vital question is not whether the Board says the A.F. of L. has a majority, but whether or not in fact it has a majority. If it has a majority, the employer must bargain; and his contract is invalid and his recognition is invalid only if the A.F. of L. did *actually* represent a majority.

Quote

pose the solution of what the Board conceives to be an anomalous situation, in that Sec. 7 guarantees employees the right to select freely their representative for collective bargaining, while the proviso to Sec. 8 (3) permits a closed shop contract with inherent possibilities for invasion of the right guaranteed by Sec. 7. The solution arrived at in the Rutland Court case, and urged here, is that the Board may not give full effect to the proviso of Sec. 8 (3) because to do so would permit circumvention of Sec. 7. We turn to this contention."

3. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

Comment

and policy of the Act." The Rutland Court Doctrine, invalidated in the *Colgate* case and the Midwest Piping Doctrine, involved in this case, are both engrafted on the law by the Board because of the Board's conclusion that such additions to the law are necessary to permit employees to make a free choice of a new bargaining agent.

This language argues strongly for the respondent's position in the present case. The Board's policy may no more make an unfair labor practice out of that which is required by Sec. 8 (5) than it can make an unfair labor practice out of what is authorized by the Sec. 8 (3) proviso.

Quote

4. "It must be remembered that this is a contest primarily between labor unions for control. It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative, regardless of internal disruptions growing out of agitation for a change in bargaining representative. In the instant case the employees exercised their right to choose their bargaining representative. The representative bound them to a valid contract. The contract was lived under for four years, and was subsisting at the period of time in question. It was made and carried out in good faith by petitioner who cannot be held guilty of an unfair labor practice by administrative amendment of the statute. We reject the application of the so-called Rutland Court doctrine."

Comment

In the *Colgate* case the contract was one of indefinite duration. Here, the contract provided for yearly renewals, was renewed before the Board's order of February 15, 1946, and the renewal affirmed by a separate instrument after the Board's order cast doubt on the validity of the renewal. It is certainly unreasonable to suppose, as does the Board, that there can be no collective bargaining representative while the Board is resolving an "internal disruption growing out of agitation for a change in bargaining representative". The stability of labor relations achieved by the collective bargaining contract is even more necessary during such a period of disruption. The Board may not hold petitioner guilty of an unfair practice for doing what the law contemplated and required. The Board's decision so holding was, as in the *Colgate* case, an "administrative amendment of the statute".

SUMMARY.

In its decision of February 15, 1946, the Board stated (Record 58) that its decision meant "the employees will have no bargaining representative to ne-

negotiate an exclusive collective bargaining agreement to cover the coming season, until a new election can be held which may result in one of the rival unions being certified. The current A. F. of L. contract will expire on March 1, and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as a bargaining agent after that date." The Board, in its reply brief, states (p. 4) "the net effect of the Midwest Piping rule is that the Board, after weighing the competing factors in favor of the policy of stability on the other, came to the conclusion, as it did also in the *Local No. 2880* case, that the factors in favor of freedom of choice outweighed those in favor of stability in the given circumstances."

The Board, therefore, asserts the right, in its administrative discretion, to read into the law that during the pendency of a request for a change in bargaining representatives, the right of employees to bargain collectively and the obligation of the employer to contract with the majority union is administratively excised from the Act. Congress has not so provided, but the Board, by administrative legislation, seeks to fill in what it considers to be an omission in the statute. The Supreme Court has clearly indicated in the *Colgate* case that such administrative legislation is forbidden the Board. It is respectfully submitted that the *Colgate* decision requires a decision that the

order herein is invalid as administrative legislation, and must be set aside.³

Further oral argument will be presented if desired by the Court.

Dated, Oakland, California,

January 13, 1950.

Respectfully submitted,

J. PAUL ST. SURE,

EDWARD H. MOORE,

JEFFERSON E. PEYSER,

Attorneys for Respondent.

³The Supreme Court and this Court have held that:

"An order * * * made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

NLRB v. Pacific Greyhound Lines, Inc., 303 U.S. 261; *NLRB v. Oregon Worstcd Company*, 94 Fed. (2d) 671; *NLRB v. Lettie Lee, Inc.*, 40 Fed. (2d) 243. Respondent realizes, therefore, that compliance with an order of the Board or other intervening circumstances may not affect the validity of the order or be raised as a defense to enforcement of the order. However, in the event that respondent's contentions herein should not be sustained and an order should be entered, respondent may desire (dependent upon the provisions of any order that may be entered) to urge that the entry of the stipulated order and decree in *NLRB v. California Processors and Growers, Inc., et al.*, No. 12344, raises serious problems concerning the obligations of respondent under any order that might be entered in this case.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SEATTLE BREWING & MALTING CO., a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**UPON PETITION TO REVIEW DECISION OF THE
UNITED STATES TAX COURT**

PETITIONER'S REPLY BRIEF

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FILED

MAY 24 1947

UL P. O'BRIEN,

CLERK

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE BREWING & MALTING Co., a corporation,
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Respondent.

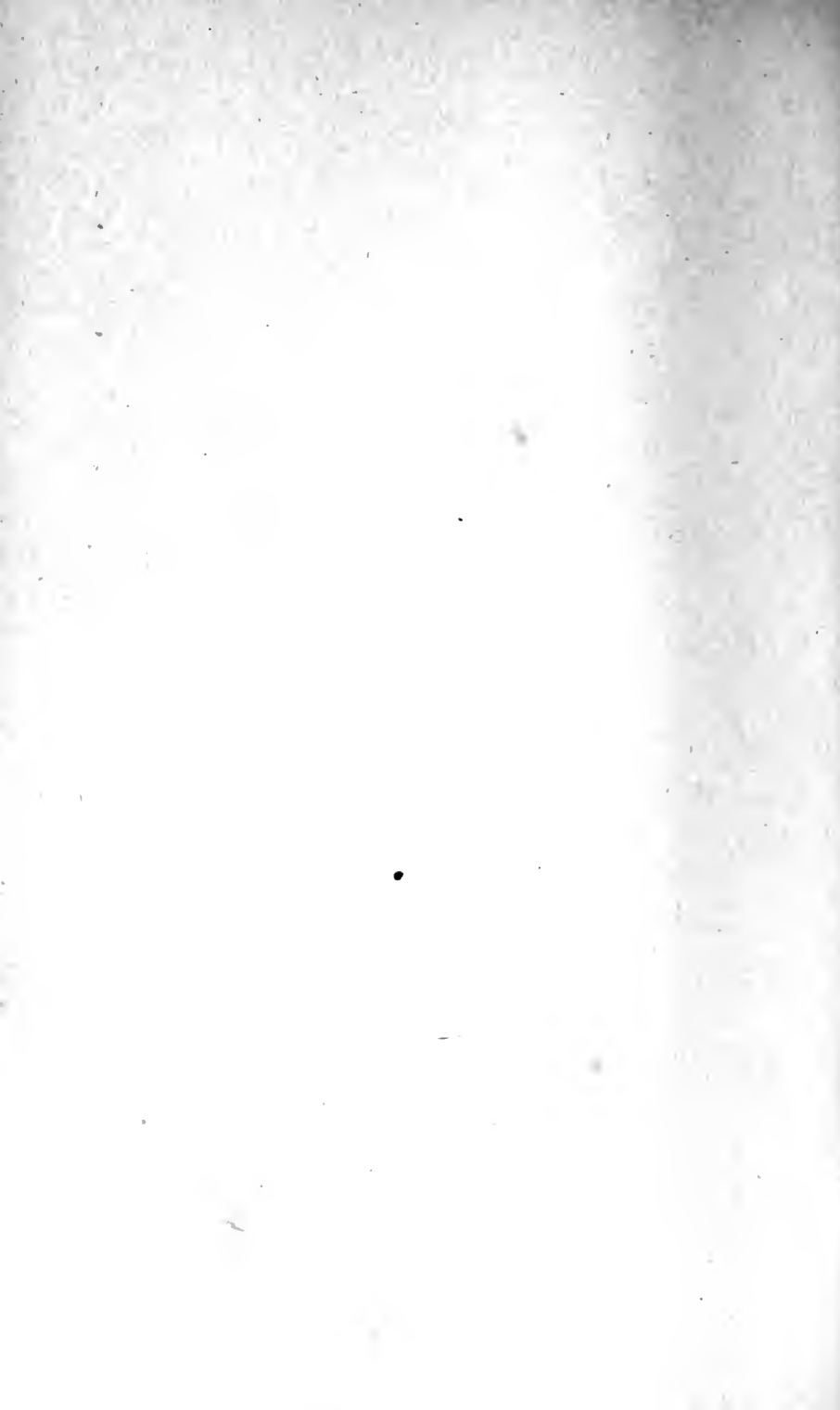
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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<hr/>		No. 11467
SEATTLE BREWING & MALTING Co., a corporation,	}	
vs.		
COMMISSIONER OF INTERNAL REVENUE,	}	
<i>Petitioner,</i>		
<i>Respondent.</i>		
<hr/>		

**UPON PETITION TO REVIEW DECISION OF THE
UNITED STATES TAX COURT**

PETITIONER'S REPLY BRIEF

INTRODUCTORY

Respondent, in his answering brief, has centered his argument principally on the question of whether the payments which petitioner became obligated to pay to Rainier periodically after July 1, 1940, pursuant to exercise of the option contained in the original contract of April 23, 1935, and which petitioner accrued in 1940 and 1941, having paid in 1941 the sum of \$200,000, the amount of the first note, were deductible under the provisions of Section 23(a)(1), I.R.C. It is to be noted at the outset that the principal contention contained in respondent's brief does not deal

with as broad a question of law as that which was at issue before the Tax Court and which the Tax Court in its opinion dealt with at considerable length. This question involved whether or not, by exercise of the option, petitioner acquired from Rainier a capital asset, so that the payments which petitioner became obligated to make to Rainier after July 1, 1940, were the consideration and the purchase price therefor. The Tax Court found that a sale and transfer of a capital asset occurred. Petitioner has, of course, taken the view in its opening brief upon appeal that the Tax Court was in error in this respect and that petitioner obtained in return for its payments made after July 1, 1940, merely a limited license to use trade names which were and which remained the property of Rainier, in other words, a limited license basically unchanged in nature from that which it had enjoyed during the five preceding years. Once it is established that no sale of an asset occurred by reason of petitioner's exercise of the option or by events subsequent thereto, occurring within the taxable years in question, then it is petitioner's position that payments made pursuant to exercise of the option fall squarely within the purview of Section 23(a)(1), I.R.C. as "rentals, or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." Respondent has now apparently abandoned his former position, in which he asserted that a sale of a capital asset to petitioner had occurred and that the payments which petitioner made

were for "property to which the petitioner was taking or had taken title or in which it had an equity," and has repudiated the holding of the Tax Court insofar as it was based upon that legal position (Res. Br. 18, 19). Particularly noteworthy in this respect is respondent's statement beginning at the bottom of page 18 of his brief:

"Taxpayer argues that there was no sale—that the agreement with Rainier constituted a license and the exercise by taxpayer of its option resulted merely in the substitution of lump sum payments in place of annual royalties based on a barrelage rate of production. *We are inclined to agree with this interpretation of the agreement.*" (Italics supplied)

In view of the above, petitioner in its reply brief will confine itself to a discussion of respondent's present position and will rely, without further amplification, upon the argument and authorities contained in its opening brief on the question of whether under the contract and exercise of the option a sale of a capital asset occurred which would characterize the payments made by petitioner after July 1, 1940, as being in payment of the purchase price for acquisition of such an asset and whether the Tax Court erred in its interpretation of the intent and legal effect of the contract between petitioner and Rainier. Thus it is apparent that the petitioner has succeeded in persuading the respondent as to the correctness of its position that both the annual royalties and the lump sum payments made by it pursuant to the exercise of its option were payments for a license and that such payments were properly termed royalties or rentals (Res. Br. 19).

ARGUMENT

With this background of departure from the main issue which was before the Tax Court, the respondent has devoted a major portion of his brief to the argument that even though the fixed or lump sum payments made by petitioner after July 1, 1940, were payments made for the use of another's property to which the taxpayer was not taking title, which, in effect, must result from his having conceded that there was no sale of a capital asset to petitioner and from his classification of the payments as rentals or royalties, such payments nevertheless are not deductible as business expenses for the taxable years involved here by reason of the fact that they were not geared to production and provided petitioner with benefits which extended beyond the year in which the particular payments were made or accrued.

To this argument, petitioner has a three-fold answer:

(1) The lump sum payments were just as much geared to production as the barrelage payments because they approximated the barrelage payments in amount;

(2) The lump sum payments were just as much measured by the benefit petitioner expected to receive in the year of payment, as were the barrelage payments;

(3) The fact that benefits derived from payment in one year extend beyond the year of payment is not determinative of the deductibility of such payment.

Although petitioner believes that it has made its

position on point (1) abundantly clear in its opening brief, nevertheless, at the risk of perhaps being repetitious, it is felt that a momentary reference to the factual situation behind the payments under the option should suffice to clarify the point in petitioner's favor. If we omit from consideration the accelerated payments made in 1942 to discharge obligations under the option which would otherwise have fallen upon petitioner during succeeding years, we find as an uncontroverted fact (Res. Br. 12) (Tr. 109) that petitioner's decision to exercise the option and to make fixed sum payments over a period of five years in the sum of \$200,000 a year was motivated by consideration that royalty payments, if continued on a barrelage basis as in the preceding five years, would equal or exceed the fixed sum payments. Such payments were then, in their inception, and in a very real sense, just as much geared to estimated annual production for the period as were the barrelage payments.

As to the second point, the benefit which petitioner anticipated would accrue to it from each year's payment was expected to be measured closely by the amount of the payment. Such being the case, the payments were no different in character from those, fixed in amount, which a lessee normally pays for the use of leased property. It can hardly be controverted that rent for the use of property is, generally speaking, fixed according to market value and wholly without relation to the production of the tenant. The cases cited on this point by petitioner in its opening brief are merely a few of a large number which recog-

nize and accept fixed or lump sum payments without question. A fixed sum payment is as equally a consideration paid for the use of another's property as one determined in amount upon a percentage basis. Therefore, payments accrued by plaintiff under the option agreement in 1940 and 1941, while they differed from the previous payments in the method of determination of the dollar amount in each case, were not, by that one difference in any way rendered the less deductible.

A brief comparison of petitioner's situation on December 31, 1940, as compared with December 31 of any year between 1935 and 1940 further emphasizes the correctness of petitioner's position. In the former years petitioner would have accrued on that date an amount equivalent to the stipulated percentage of its production for the preceding six months. For the year 1940, instead of doing this, it accrued a flat sum of \$100,000. Likewise at the end of 1941, it accrued the amount of its fixed obligation for that year, namely \$200,000. By way of further illustration of this point, let us suppose that the original contract of 1935 had provided for renegotiation after a five-year period, rather than exercise of an option. Suppose in 1940, Rainier had told petitioner it might continue use of the trade name at a price of \$200,000 a year thereafter for a period of five years at the end of which time some further adjustment might be made. At the end of that five-year period suppose a new contract was entered into for use of the trade name upon compliance with certain requirements, but without the requirement that any royalty pay-

ments be made. There could be little question that in such case the payments of \$200,000 per year over the five-year period would have been deductible under Section 23 (a)(1). The mere change from a percentage basis to a fixed sum basis of payment would not operate to change the nature of the payments from a tax standpoint.

Respondent's attempt to differentiate the payments made prior to 1940 from those made thereafter on the ground that the original payments for the use of the trade name were made for the year of payment only and to secure benefits applicable to that year is not in accord with the original contract under which petitioner obtained a "perpetual" license, nor is it in accord with the actual economic effect of the barrelage payments. As the barrelage royalty payments continued to be made during the years from 1935 to 1940, the benefits to be derived from each year's payments were not strictly limited to the year in which the payment occurred. This is obvious from the schedule of sales (Pet. Ex. 15) showing a steady increase from year to year resulting in petitioner's estimate in 1940 that annual royalties on a barrelage basis would thereafter be somewhere in the neighborhood of \$200,000 a year. Had Rainier first licensed use of the trade name to petitioner in 1939 instead of 1935, it can hardly be maintained that its value to petitioner would have been as great as it was as a result of petitioner's use of it over the previous several years. We must conclude, therefore, that at least some benefit was derived by petitioner in years following the year of payment from each annual

payment on a barrelage basis, and yet the Commissioner has not questioned the propriety of claiming those payments as deductions for the years in which they were made.

If a mere change in the amount of a deduction is insufficient to determine whether it is, in fact, deductible or not, then we may consider what, if anything, petitioner received in consideration of its payments or accruals in the taxable years in question which was sufficiently different from what it had received for annual payments prior to 1940 to constitute a change in tax treatment of such payments. This is answered by considering what would have happened to petitioner's rights to the use of the trade mark had it failed to make the payment of \$200,000 required of it on July 1, 1941. The answer is obvious. Its rights under the original contract would have been subject to termination by Rainier just the same and to the same extent as if it had failed to pay the royalties due in any of the preceding years computed upon a barrelage basis. Payment of the first note upon its due date was as vital to the continuation of petitioner's rights to use Rainier's trade name as any payment would have been under the agreement prior to exercise of the option. Payment of the \$200,000 made in 1941 was entirely exhausted during that time and the benefit derived therefrom did not extend beyond that year in which payment was made to any greater degree than did the benefits derived from any of the annual payments made in the years 1935 to 1940, which payments both the respondent and the Tax Court have agreed are properly deductible. At the

end of the period for which the payment was made in 1941 taxpayer had no greater assurance that it would enjoy the continued use of Rainier's trade name than it had in any of the preceding years with respect to which payments upon a barrelage basis had been made. Continued use and enjoyment of the trade name in 1942, for example, was wholly and entirely contingent upon the payment of the \$200,000 which petitioner had obligated itself to pay in that year.

Had each note been paid upon its due date, that is, annually, for a period of five years, the same situation would have prevailed with respect to the notes due in each of these years. Failure to pay any one of them upon its due date would have resulted in petitioner's loss of the right to use the trade name. The fact that some of these notes were, subsequent to the taxable years here involved, paid off in advance, should not be given consideration in determining the nature of the payments made or accrued in the particular taxable years in question. In any case, the prepayment of the annual obligations would merely mean that petitioner could not take a deduction for the entire amount in the year of payment but should properly be allowed deductions allocated to the years over which the payments were originally expected to be made.

Payment of the note upon its due date was "required to be made as a condition to the continued use or possession, for purposes of the trade or business of property to which the taxpayer has not taken or is not taking title." Quoting as we have from the

exact language of Section 23 (a)(1) of the Code, we submit that such payment falls completely within the statutory language and that in so doing, its deductibility is established.

As to the third point, despite respondent's contention that as a condition to deductibility under Section 23 (a)(1), the payment must not result in benefit beyond the taxable year, we find any number of instances in the field of tax law where benefits do accrue beyond the taxable year from payments which are allowed as properly deductible expenses.

As previously pointed out, the use of the trade name by petitioner for one year and payment therefor would necessarily result in benefit to petitioner in future years. The fact that petitioner paid for the use of the trade name in one year, whether payment was on a barrelage or fixed sum basis, enabled petitioner to have the right to use the trade name in a subsequent year upon making payment for that year and to that degree provided a benefit extending beyond the year of the original payment. As we have attempted to show, this situation was no different after exercise of the option from what it was before, and it is no different, also, from a variety of situations which may be cited in which some benefit must of necessity extend beyond the taxable year, and yet the payment is allowed as a deduction in toto in the year in which made. Thus, the advertising expenses of a business in any one year redound to the benefit of the taxpayer in subsequent years and yet such expenditures are uniformly permitted as current deductions. Payments made for engineering services,

for executives' salaries and for salesmen's salaries, all contemplate benefits to the corporation paying them which will extend beyond the year in which payment is made and result in the building up of good will, expansion of the business, greater acceptability of the company's products, wider markets, and greater profits; the same is true in the case of leases of property. A uniform rental may be paid when in fact the benefit derived therefrom by the tenant might be much greater as the property is developed than it was in the earlier years of the lease. In support of his position respondent has quoted at length from 4 Mertens, Law of Federal Income Taxation, Sec. 25.17 (Res. Br. 22-23). Respondent might well have given a more complete picture of the situation by continuing his quotation, which reads (*Ibid.* Page 338-339):

"The test of ultimate advantage or increase in value of the property is an unreliable guide. Assuming that the expenditure is ordinary and necessary in the operation of the taxpayer's business, the answer to the question as to whether the expenditure is an allowable deduction as a business expense must be determined from the nature of the expenditure itself, which in turn depends on the extent and permanency of the work accomplished by the expenditure."

Respondent's quotation, outlining the type of expenditure which is not deductible, has reference specifically to an expenditure made for the acquisition of an asset which has an economically useful life beyond the taxable year, yet it is this very "acquisition of a capital asset" which petitioner has consistently

maintained, did not occur either before or after the exercise of the option and respondent has conceded as much in admitting that no sale took place. How else could petitioner have acquired from Rainier an asset belonging to Rainier, except by purchase, gift or legal process?

The analogy between the usual expenditures for advertising and the accrual by petitioner of payments for 1940 and 1941 to Rainier for use of its trade name is striking. The Bureau of Internal Revenue has taken the position in these cases that advertising expenses are not to be treated as deferred charges, but are deductible as business expenses only during the year paid or incurred.

O.D. 1039, Cum. Bull. 1930 (1921);

Colonial Ice Cream Co., 7 B.T.A. 154 (1927);

F. E. Booth Co., 21 B.T.A. 148 (1930);

Richmond Hosiery Mills, 6 B.T.A. 1247 (1927) aff'd. C.C.A. 5, 1928) 29 F.(2d) 262, cert. den. 279 U.S. 844.

These cases have recognized that the expenditures involved may have represented substantial amounts classifiable as capital expenditures in the nature of deferred charges, as well as amounts of current expense and yet the whole amount is allowable as a deduction in the year of payment.

Likewise in the recent case of *Scruggs-Vandervoort-Barney, Inc.*, 7 T.C. No. 93, petitioner, a retail department store, decided to reimburse the depositors of a bank which went into receivership and which had been substantially owned by petitioner's prede-

cessor. It issued merchandise purchase certificates redeemable at its store to the bank's depositors for the amount of their losses and deducted the total amount on its income tax return as an ordinary and necessary business expense. The deduction was allowed, the court stating in part as follows:

"We think that the facts in the instant case show that the expenditures in question were made to protect and promote petitioner's business and did not result in the acquisition of a capital asset."

Manifestly such an expenditure as this would result in benefit to the taxpayer in years subsequent to the one in which the deduction was claimed, to a greater extent, in fact, than could conceivably be the case with respect to the payments made or accrued during 1940 or 1941 by petitioner herein, inasmuch as any future benefit which could be derived from these payments was contingent upon petitioner's continuing to make the other payments for which it was obligated in subsequent years. In the case cited, however, the benefits to taxpayer by its expenditure would extend beyond the taxable year without any such contingencies being involved. Of similar import, though admittedly not in point upon their facts, are such cases as *Watkins Salt Co.*, 1 T.C. 125, where a lump sum compromise settlement of a claim alleged to be due from prior years was allowed in full as a deduction in the year in which paid; *Saks & Co.*, 20 B.T.A. 1151, where there was allowed as a deduction payment for legal services which might properly have been capitalized. The court recognizes, at page 1156, that the

benefits from legal advice are often not confined to the year in which given but because of the impracticability of segregating capital and expense items in such payments, the deduction was allowed. To the same effect is *First National Bank of Skowhegan, Maine*, 35 B.T.A. 876, in which the taxpayer made a payment to an out-of-town bank in consideration for the latter's taking over the assets and assuming the liabilities of a local bank about to be closed. The expenditure was made to protect petitioner's business and was allowed as an ordinary and necessary expense within the meaning of Section 23(a). Here again it is manifest that the consequences of such expenditure would inure to the benefit of the taxpayer well beyond the year in which the payment was made.

Petitioner therefore submits that the respondent is in error in taking the position that, if a payment made for the use of another's property results in a benefit to the one making the payment which extends beyond the taxable year in which the payment is made, no deduction for such payment can be allowed. Petitioner further submits that, even assuming the Commissioner to be right in this position, he is nevertheless in error in applying it to the payments made or accrued by petitioner in the taxable years 1940 and 1941, for the reason that no greater benefit in subsequent years accrued to petitioner as a result of such payments than accrued in prior years as a result of payments on the *barrelage* basis.

Several further points of lesser importance remain to be clarified with respect to respondent's brief.

Respondent, at page 23, refers briefly to the phrase "or in which he has no equity" contained in Sec. 23 (a)(1) and merely suggests that it is applicable adversely to petitioner's position. Lest this reference result in some confusion, petitioner submits that the following authorities establish that the meaning of the word "equity" as used therein is synonymous with equitable title. This is settled in the case of *Citizen's National Bank of Kirksville, Missouri*, 42 B.T.A. 539, aff'd. (C.C.A. 8) 122 F.(2d) 1011, cert. den. 315 U.S. 822, in the course of which opinion the court approved a definition of equitable title as a right possessed by a person to have the legal title to property transferred to him upon the performance of specified conditions. Other authorities to this effect include:

20 C.J. 1304;

16 Cyc. 90;

Des Moines Joint Stock Land Bank v. Allan
(Iowa) 261 N.W. 912, at 917;

Austin v. American Surety Co. (Calif.) 4
P.(2d) 577;

Alexander W. Smith, Jr., 20 B.T.A. 27;

W. C. Cashin & Co. v. Alamac Hotel Co.
(N.J.) 131 Atl. 117.

These cases treat and apply the term "equity" as synonymous with equitable title or equitable interest and as meaning a real beneficial interest or substantive right of the taxpayer in property to which the legal title is held by another.

See, to the same effect with respect to equity as meaning equitable title, *Steve Lodzieski v. Commis-*

sioner, Docket No 3060, Memorandum Decision entered October 6, 1944 (3 T.C.M. 1056).

In the cases where it is held that the taxpayer is "taking an equity," situations were involved where the taxpayer was, in fact, by its payments acquiring an equitable interest, although it had not ripened into legal title. In the instant case petitioner has acquired neither a legal nor an equitable title in the trade names for the use of which payments were made and by reason of the continuing obligations of the contract between Rainier and petitioner, petitioner had no expectancy of acquiring legal title in the future to the trade names. This was basic, as petitioner has pointed out in its opening brief, by reason of the fact that Rainier steadfastly refused to sell petitioner its trade name. Furthermore, respondent has conceded this point in admitting that no sale of a capital asset occurred.

Respondent has characterized petitioner's license as a combination of elimination of competition and the use of Rainier's good will and trade names (Resp. Br. 27). If respondent's reference to elimination of competition is intended to apply to any pre-existing manufacture of products by Rainier under the trade names in the territory involved herein, it is contrary to the evidence (Tr. 38-39, 116). With respect to elimination of sales competition, it must be borne in mind that the payments claimed as deductible were not, by the terms of the agreement, made in consideration of transfer of good will or elimination of competition, or anything other than the right to use the trade names. If restriction of competition

followed from the fact that the license was an exclusive one within a certain territory, it is simply as collateral and incident to the exercise of the license. And if these factors which respondent denominates a permanent asset accrued to petitioner through the payment of fixed compensation, it is equally true that they accrued as a result of payment of barrelage compensation. If they were acquired at all, they were acquired at the time of the original grant in 1935, for the entire rights which petitioner obtained arose out of the grant of the license under the agreement of that year.

Respondent makes a point at page 25 in its brief of the fact that there is no basis for amortization of any part of the lump sum payments to the taxable years and adverts to petitioner's admission on this point. Petitioner's position in this respect should be clearly understood. It takes the position that it did not acquire a capital asset from Rainier, and with this the respondent has substantially agreed by admitting that no sale occurred. Petitioner admits only that, had it acquired a capital asset by purchase from Rainier, then and then only would there be no basis for writing off the market value of such asset by amortization. Since, however, petitioner did not become the owner of a capital asset, the question of its right to amortize such is academic. It would have no right to amortize the cost of such an asset, even assuming a basis for doing so could be found, because it was not the owner thereof.

It is to be noted that respondent on page 18 of his brief assumes that petitioner has abandoned its al-

ternative claim to deductions on the basis of royalties which would have been paid on the old barrelage rate during 1940 and 1941. Petitioner has not abandoned this claim, but simply has not seen fit to raise and discuss it in its brief by reason of the fact that the Tax Court was not called upon to decide between various possible methods of determining the amount of the deduction, having decided that no deduction whatsoever was allowable. Petitioner maintains that it should be permitted to deduct as an accrual the annual payment of \$200,000 as revised rental or royalty for the five-year period, or at least for the taxable years 1940 and 1941, the years involved herein; and if this is not deemed proper, then, secondly, that the payments or obligations should be treated as prepaid expense and deducted on such basis as would best properly reflect income and that under the evidence offered by the petitioner this would be a continuance of the barrelage rate (Tr. 126).

There remain to be considered, several cases which respondent has cited in support of his contentions. One is *Duffy v. Central Railroad*, 268 U.S. 55, cited at page 29 of respondent's brief as authority for the position that the lump sum payments made by petitioner were not, by reason of the other continuing obligations under petitioner's agreement with Rainier, failure to perform which would at all times have resulted in forfeiture of the license by petitioner, prevented from being capital investments. On its facts alone, that case presented a very different situation from the one involved here. Under the terms of the lease involved therein the taxpayer was required

to acquire and pay for the interest of private owners in an old pier and to construct a new one in its place. It sought to claim a deduction for the cost of performing this provision of the lease. Clearly such an expenditure resulted in the acquisition of new additions to the properties and the expenditure was exactly the sort of thing provided for under the depreciation sections of the statute involved. The court held that the expenditure was not a rental or other payment required to be made as a condition to the continued use or possession of the property, saying that that section of the statute did not include payments uncertain both as to amount and time made for the cost of improvements.

The case of *Welch v. Helvering*, 290 U.S. 111 (Resp. Br. 29), while concerned with the application of the same statutory language as that with which we are involved was decided with relation to a portion of that language with which we are not now concerned. That question involved whether or not the payments concerned were "ordinary" business expenses, with respect to which phrase respondent has raised no question in the instant case. The court determined that the payments involved were not ordinary but "in a high degree extraordinary" (290 U.S. 112, at 114). Indeed, the opinion in this case is worthy of consideration as upholding petitioner's position that it is not vital in determining the deductibility of a business expense under Section 23 (a) (1) that benefit therefrom be received and exhausted in the year of payment. The court points out that a law suit affecting the safety of business may happen once

in a lifetime and yet the expense is an ordinary one (page 114). Likewise, in the cases cited in the footnote at page 115 of the opinion, we find various instances where expenses have been allowed as deductions in one year and yet beyond question a benefit therefrom would accrue to the taxpayer in subsequent years as well as in the year of payment. The *Welch* case was cited, explained and distinguished in *First National Bank of Skowhegan, Maine*, 35 B.T.A. 876, at page 884.

CONCLUSION

From the foregoing, petitioner submits that the payments made by petitioner pursuant to exercise of the option come completely within the statutory language of Sec. 23 (a) (1), I.R.C., and should be allowed as deductions either at the rate of \$200,000 per year for the taxable years in question, or by allocation of prepaid expense in accordance with the petitioner's established practice of accounting on the barrelage basis.

Respectfully,

JONES & BRONSON,
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A. R. KEHOE,
R. B. HOOPER,

CHADWICK, CHADWICK & MILLS,
STEPHEN F. CHADWICK,
Counsel for Petitioner.

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SEATTLE BREWING & MALTING Co., a corporation,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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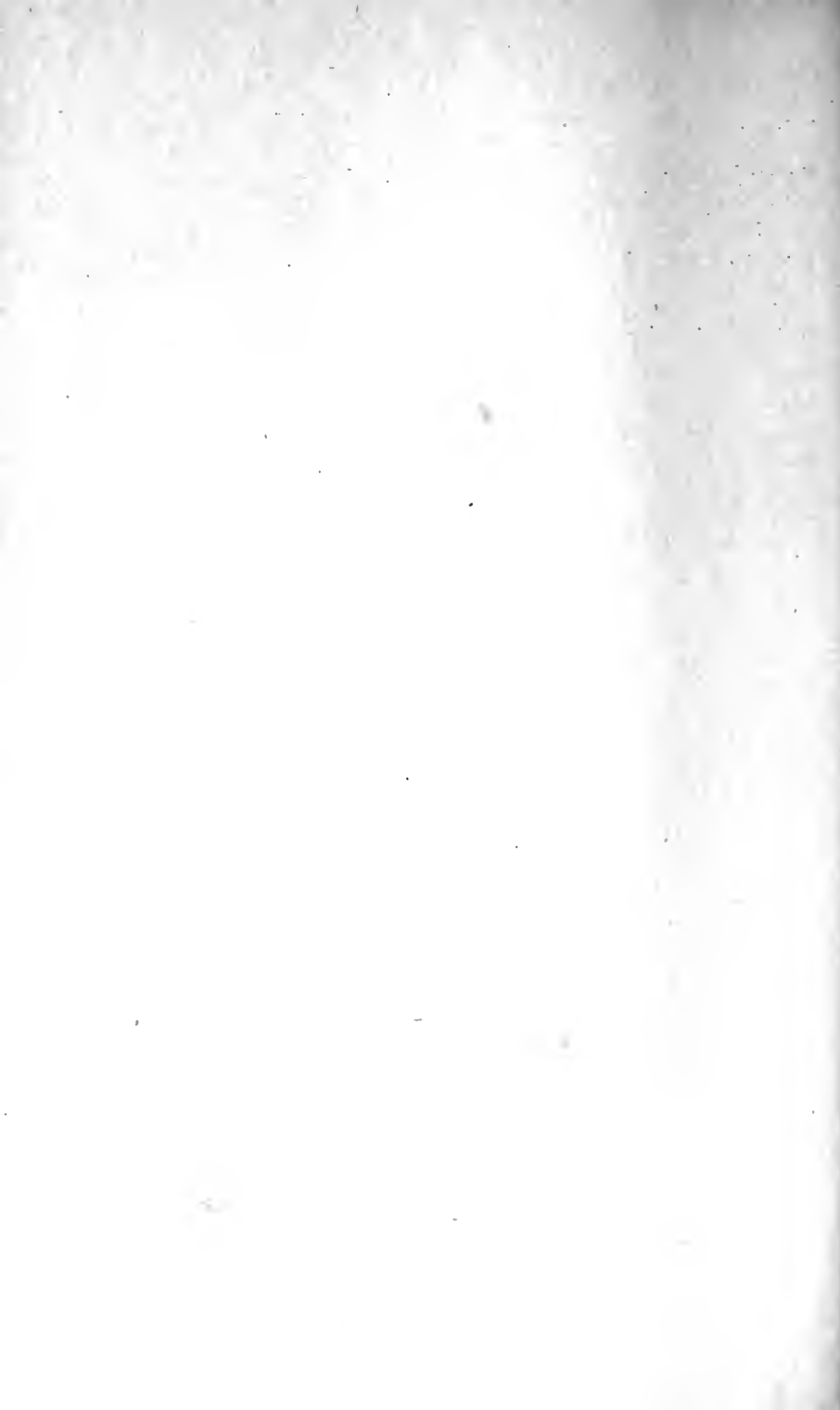


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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SEATTLE BREWING & MALTING Co., a
corporation,

Respondent.

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No.11467

PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT AND TO THE HONORABLE
JUSTICE AND JUDGES OF THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE NINTH CIRCUIT,
severally and individually, to-wit:

Hon. William O. Douglas

Hon. Francis A. Garrecht

Hon. William Denman

Hon. Clifton Mathews

Hon. Albert Lee Stephens

Hon. William Healy

Hon. Homer T. Bone

Hon. William E. Orr

The petitioner asks for a rehearing of this case.
The petitioner submits as the basis for this request

for a rehearing that this Court was mistaken in viewing the holding and decision of the Tax Court upon the matter under review in this case as involving a mixed question of fact and law; and further, that in view of the total absence of argument or discussion of this point either in the briefs or at the hearing, it should in all fairness be granted opportunity for presentation of its views before the case is disposed of on such a basis.

We think it will help in consideration of this petition, particularly by those members who did not participate in the hearing, to have the following summary of the issues involved and proceedings taken.

On April 23, 1935, Rainier Brewing Company (hereinafter called "Rainier") entered into a contract with petitioner (Ex. 1, Tr. 139) whereby it sold petitioner certain tangible property and granted petitioner a license to use certain trade names, limited as to territory and scope, upon payment of annual royalties related to volume, with the provision that after operating for five years on such a basis petitioner should have the right to convert future royalty payments from the quantity of production to a lump-sum basis, which it did in 1940. Payments made prior to 1940 were claimed and allowed as deductible expense in determining net income for tax purposes. Petitioner thereafter continued to claim similar deductions of amounts substantiated by good accounting practice, as rental for the use of property belonging to another, until the exhaustion of the lump-sum payments, under §23(a)(1)(A), I.R.C.

The Commissioner held that the change in payment converted the transaction into the acquisition of a capital asset and assessed a deficiency resulting from disallowance of the claimed deductions in 1940 and 1941. The Tax Court sustained the Commissioner (Tr. 36), holding that as a matter of law and construction of the contract, the exercise of the option or election by petitioner effectuated a sale of the trademarks under the terms of the contract. It disregarded and did not pass upon petitioner's claim to a deduction on the basis that no sale or transfer of ownership of the trademarks had occurred.

During the course of this proceeding there was also pending a controversy between the Commissioner and Rainier, which had reported the lump-sum payments as gain on the sale of a capital asset, involving a lower rate of tax. The Commissioner disallowed this claim on the basis that the payments made by petitioner to Rainier constitute ordinary rental income. Rainier in its turn petitioned the Tax Court for a review of this holding.

Petitioner's case came on first in the Tax Court and was heard by Judge Mellott, who shortly afterwards resigned before handing down a decision. Rainier's case was tried some months later before Judge Harron, who also took over the *Seattle* case on the record made before Judge Mellott. The *Seattle* case was decided first and later, in deciding the *Rainier* case, which involved other substantial issues, the Tax Court held that Rainier correctly treated the payments as proceeds from the sale of the trade-

marks and applied the rule of capital gains on the basis of its holding in the *Seattle* case. *Commissioner v. Rainier Brewing Company*, 7 T.C. 162.

In its petition to this Court petitioner makes two contentions: first, that the exercise of its option to make lump-sum payments did not result in a sale or acquisition of title or ownership of the trademarks, and secondly, that being true, petitioner is entitled to a deduction to be determined in accordance with good accounting practice of amounts paid for continued use of the trademarks. Petitioner devoted most of its opening brief to the question of whether or not there was a sale, which was the only issue dealt with by the Tax Court. The Commissioner in answering conceded that the Tax Court was in error in deciding that there was a sale, and agreed that there was no sale or transfer of title to the trade-names to petitioner and that its lump-sum payments were in the nature of royalties. He did not, however, agree that such payments were deductible as rent or royalty.

In the *Rainier* case the Commissioner had petitioned this Court for review, Docket No. 11547, and contended in his opening brief much more definitely than he had admitted in his answering brief in the *Seattle* case that the transaction was not a sale. Various other issues were involved and considered on the briefs, including the application of the *Dobson* rule (*Dobson v. Commissioner*. 320 U.S. 489, 88 L. ed. 248) to that case. The two cases were assigned for hearing and heard upon the same day, but they were not consolidated either for hearing or decision, and

the record in this case is wholly and completely independent of the record in the *Rainier* case.

The per curiam opinion in this case, filed January 9, 1948, reads as follows:

"This, as the companion case of *Commissioner of Internal Revenue v. Rainier Brewing Company*, No. 11547, this day decided, presented to the Tax Court 'hybrid questions of mixed law and fact (and) their resolution because of the fact element involved will * * * afford little concrete guidance to future cases.' We hence do not consider the petitioner's contention that 'the facts found fall short of meeting statutory requirements.' *Bingham v. Commissioner*, 325 U.S. 365, 370; *Choate v. Commissioner*, 324 U.S. 1.

"The decision of the Tax Court is affirmed."

The opinion in the *Rainier* case filed at the same time is identical except for cross reference.

The last sentence of the opinion referring to "petitioner's contention that 'the facts found fall short of meeting statutory requirements,'" is wholly irrelevant to this case. It appears to be a paraphrase of a portion of the opinion in the *Bingham* case which was discussing "questions of reasonableness and proximity." Even if justified as to the *Rainier* case, it is wholly inapplicable to this case, in which neither party has raised any contention as to sufficiency of the facts.

While it is true that the *Rainier* case involved a voluminous record of oral testimony and exhibits, and it is possible that the Tax Court's decision in that case might properly be regarded as involving con-

sideration of facts as well as of law sufficient to invoke application of the *Dobson* rule, and so relieve this Court from an examination or review thereof, such a situation does not extend or apply in any respect to this case. There was no evidence whatsoever in this case, either oral or written, other than the contract of April 23, 1935, and its modifications, which tended in the slightest degree, or at all, to establish that the parties had any purpose or intent to sell or transfer the title to the trademarks as distinguished from the licensing the use thereof. The Tax Court made no finding as to the intent or purpose of the parties (Tr. 38-53). It based its decision solely on a consideration of the provisions of the contract (Tr. 40-48).

It is true that there was some evidence offered by petitioners to the effect that Rainier would not make a sale of the tradenames (Tr. 96, 116, 119). This testimony was undisputed and could only be considered as establishing that there was no sale, or be ignored, as it was by the Tax Court in deciding that there was a sale. It could in no sense be considered as furnishing factual support, as distinguished from legal construction, for the Tax Court's determination that there was a sale.

The syllabus or headnote of the Tax Court's opinion (Tr. 36), while not a part thereof, was prepared by the Tax Court and states that "By the exercise of the option under the terms of the contract the taxpayer acquired a capital asset, and the transaction was a sale and not a license." In the body of the

opinion the references and discussion are such as to show that the Court was dealing solely with the legal effect of the contract, and leave no room for doubt that the conclusion and holding was entirely one of construction upon a point of local or general property law. As said by the Supreme Court in *Commissioner v. Henninger*, 320 U.S. 467, 88 L. ed. 121, "the Board of Tax Appeals have denied the claimed deduction not by an independent exercise of judgment but upon a mistaken conviction that denial was required as a matter of law."

The respondent has made no contention or suggestion that the decision of the Tax Court in this case involved any determination upon disputed facts foreclosing a review, and to the best of our recollection, there was no discussion of the *Dobson* rule upon the argument in this case beyond the statement by government counsel that he did not consider it applicable. (We are referring only to the argument in the instant case. There was extended discussion of the application of the *Dobson* rule in the *Rainier* case).

Perhaps if the facts justified it, the objection would be of such a jurisdictional character that it might be raised in spite of the agreement of counsel to the contrary. The position of the Government, however, is not only significant upon the substantive question, but even more important as a matter of fair procedure, it should be taken into account, because under the circumstances petitioner naturally did not include in its brief any discussion or citations bearing

upon the right of this Court to review the issue, which is the basis upon which the decision of the Tax Court is now affirmed.

The petitioner submits, therefore, that from a procedural standpoint it should be entitled to an opportunity to present to this Court its argument and authorities to the effect that the matter in controversy is properly subject to consideration and review as a matter of law. It submits further that from a substantive standpoint, as maintained by both the petitioner and the respondent, the issue decided by the Tax Court of whether or not there was a sale, was based solely on construction of the wording of the contract and is, therefore, subject to review by this Court.

It would not be appropriate here to undertake a detailed discussion of the many decisions bearing upon the right of review in cases of this kind, an extensive analysis and review of which, and of the legislative background and theory of the subject, may be found in Paul's "Federal Estate and Gift Taxation," 1946 Supplement, at pages 526 to 605. If the Court is not already familiar with this text, we urge its consideration in connection with this petition, and particularly call attention to the author's conclusion at page 602 that "the Tax Court's special competence and its informed judgment do not manifest themselves in the determination of local law, which thereupon settles tax consequences."

For recent instances justifying review, see:

Jones v. Commissioner, 152 F.(2d) 392
(C.C.A.-9);

- Three States Lumber Co. v. Commissioner*,
158 F.(2d) 61 (C.C.A.-7);
- Sunderland v. Commissioner*, 151 F.(2d) 675
(C.C.A.-3);
- Welsbach Engineering & Management Corp. v.
Commissioner*, 140 F.(2d) 584 (C.C.A.-3);
- Lum v. Commissioner*, 147 F.(2d) 356
(C.C.A.-3);
- Thornley v. Commissioner*, 147 F.(2d) 416
(C.C.A.-3);
- Helvering v. Stormfeltz*, 142 F.(2d) 982
(C.C.A.-8).

We would also expect upon rehearing to discuss the application of the Administrative Procedure Act (5 U.S.C.A. §1001) to a review of the decision of the Tax Court. The Circuit Court of Appeals for the Sixth Circuit has in two cases expressed the opinion that "review of Tax Court decisions is governed by the Administrative Procedure Act." *Lincoln Electric Company v. Commissioner*, 162 F.(2d) 379 at 382; *Dawson v. Commissioner*, 163 F.(2d) 664 at 667. The point was urged but not passed upon in *Credit Bureau of Greater New York v. Commissioner*, 162 F.(2d) 7 (C.C.A.-2) and *Anderson v. Commissioner*, recently decided by the Seventh Circuit and reported in 485 C.C.H. Par. 9109, although in the latter case the Court expressed disagreement with the conclusion reached in the *Lincoln Electric* case. It was raised again in the Sixth Circuit in *Elizabeth G. MacDonald v. Commissioner*, but not passed on, the decision of the Tax Court being held to be supported by substantial evidence. 485 C.C.H. Par. 9110.

While this Court has not referred to the *Dobson* case in its opinion, the doctrine of that case was discussed at length between Court and counsel in the argument of the *Rainier* case, and the two citations given in this Court's opinion are applications of that doctrine. Both of them, however, are clearly distinguishable from the instant case. In *Choate v. Commissioner*, 324 U.S. 1, 89 L. ed. 653, "the Tax Court found that the parties *intended* a cash sale of equipment" (Our italics). In view of that finding it was held that the question was not open to re-determination. There is no such finding here, either directly or inferentially, and, therefore, that case cannot be applicable.

In *Bingham's Trust v. Commissioner*, 325 U.S. 365, 89 L. ed. 1670, the other case cited in support of affirmance, the Supreme Court very clearly recognized that decisions of the Tax Court based on legal construction of documents are subject to review. It said in that case:

" * * * The questions whether, on the facts found, the expenses in question are nondeductible, either because they were not to produce income or because they were related to the management of property which was not held for the production of income, turn in this case on the meaning of the words of §23(a)(2), "property held for the production of income." They are therefore questions of law, decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from the basic findings. See *Commissioner of Internal Revenue v. Scottish American Invest. Co.*, 323 U.S. 119, *ante*, 113,

65 S. Ct. 169, *supra*. They are 'clear cut' questions of law, decision of which by the Tax Court does not foreclose their decision by appellate courts, as in other cases, *Dobson v. Commissioner of Internal Revenue, supra* (320 U.S. 492, 493, 88 L. ed. 251, 252, 64 S. Ct. 239), although their decision by the Tax Court is entitled to great weight. *Dobson v. Commissioner of Internal Revenue, supra* (320 U.S. 501, 502, 88 L. ed. 256, 257, 64 S. Ct. 239), and cases cited; cf. *Medo Photo Supply Corp. v. National Labor Relations Bd.*, 321 U.S. 678, 681, 682, 88 L. ed. 1007, 1009, 1010, 64 S. Ct. 830), note 1, and cases cited.

"Since our decision in the *Dobson case*, we have frequently re-examined, as matters of law, determinations by the Tax Court of the meaning of the words of a statute as applied to facts found by that court. A question of law is not any the less such because the Tax Court's decision of it is right rather than wrong. Whether or not its decision is 'in accordance with law' is a question which the statute, Internal Revenue Code, §1141(c)(1), 26 U.S.C.A. 1940 ed. §1141(c)(1), 6 F.C.A. Title 26, §1141(c)(1), expressly makes subject to appellate review. Congress, when it thus authorized review of questions of law only, was not unaware of the difficulties of such a review of the decisions of a tribunal, which decides questions both of law and of fact. But Congress did not dispense with such review.

"Hence the statute does not leave the Tax Court as the final arbiter of the issue whether its own decisions of questions of law are right or wrong. That can only be ascertained upon

resort to the prescribed appellate process by a consideration of the merits of the point of law involved, and by its decision at the conclusion of the process, not before it begins.”

We have confined our discussion on this petition to a consideration of the first point sought to be reviewed of whether or not there was a sale resulting from the exercise of the option. Neither the Tax Court nor this Court has given consideration to the second point of whether, if there were no sale or transfer of title, the lump sum payments or any part thereof are deductible as rental paid for the use of another's property under §23(a)(1)(A) I.R.C. We assume, therefore, that the opinion in this case rests squarely on the first point and is not to be understood as holding that even if there were not a sale, the statute would not support a deduction. But if such ruling is within the scope of the decision, we submit it also involves simply a question of law upon which the petitioner is entitled to the decision of this Court. Such a matter falls squarely within the class of questions stated to be reviewable in the *Bingham* case.

The thought is irresistible, as stated in that case, that “if review were to be denied in this case it would be difficult to say that any construction of a taxing statute by the Tax Court would be subject to appellate review.”

For the foregoing reasons we urge that the per curiam opinion be set aside and a rehearing granted herein.

Respectfully submitted,

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H. B. JONES,

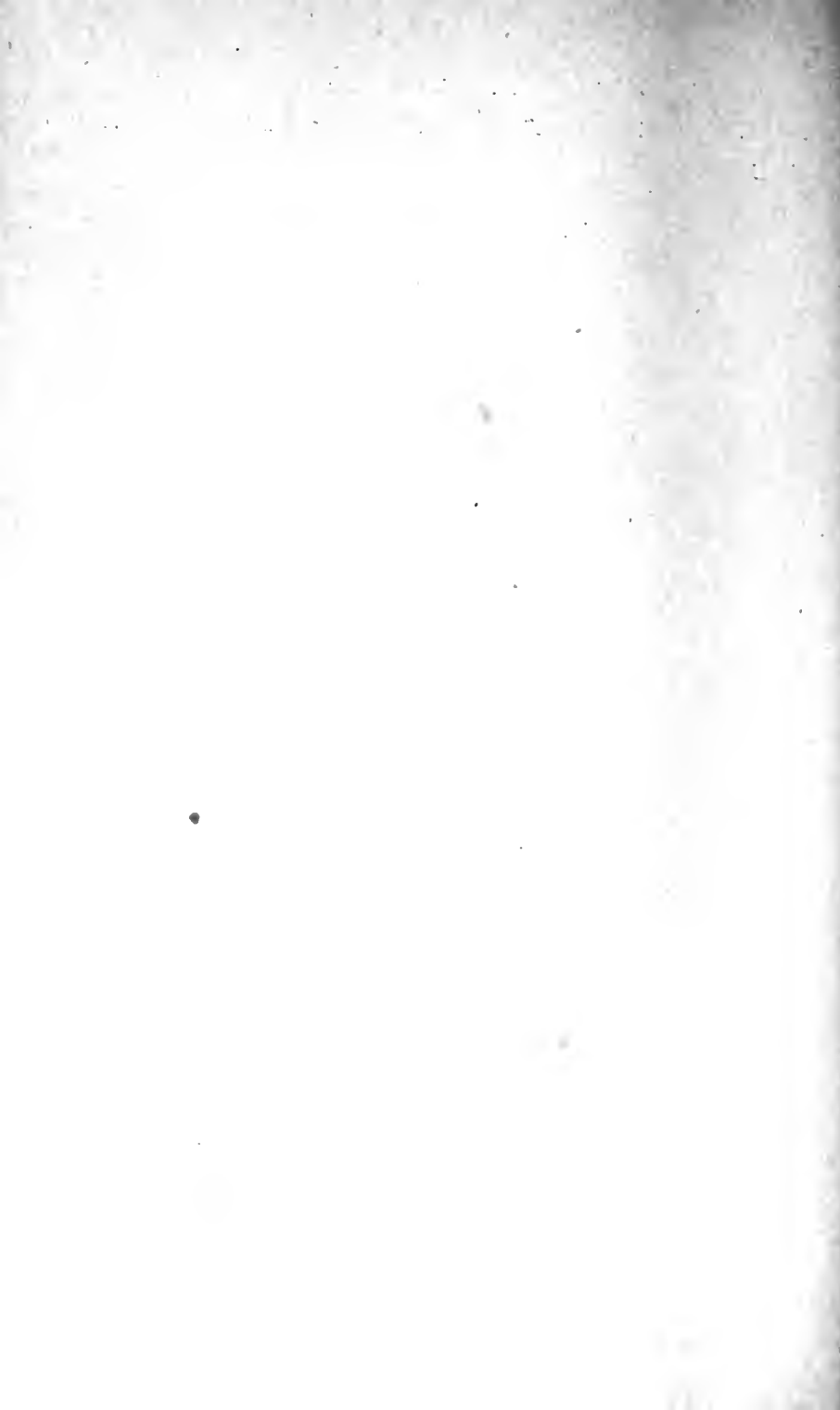
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No. 11,479

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

EARL HOINESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL HOINESS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS.

Appellee is not in serious disagreement with appellant's statement of the pleadings. It is desired, however, to stress the fact that the American South African Line Inc., and all respondents other than the United States, were dismissed in the lower Court and this appeal involves only the United States as appellee. This is admitted in the appellant's brief, page 2.

OPENING STATEMENT.

Appellee desires to acquaint the Court with a brief statement of the position assumed by the parties litigant. Appellant in his brief claims that the District Court was in error and that said Court had jurisdic-

tion of the subject matter of this libel and should have heard and determined it upon the merits and he now seeks to have this Court sit as trier of the facts in the first instance under the guise of calling such first factual adjudication a trial *de novo*. As far as can be ascertained from the authorities, this has never been accomplished heretofore. This Court, we do not believe, is in position to judge the credibility of witnesses that appeared before the trial Court. This is a matter in which the credibility and conduct of the witnesses was of prime importance and this Court, were they to follow appellant's reasoning, would be deprived of this all-important phase of the evidence upon which appellees relied heavily. At the risk of being repetitious, we point out that the District Court has never at any time considered the facts of the cause on its merits. Seven witnesses testified in person and the evidence of only one witness was taken by deposition. Additionally, there were some medical reports received in evidence.

The failure of appellant to prove his residence as being within the district where the libel was filed and his further failure to prove the fact of the vessel's presence within the United States or her possessions constituted fatal error.

It is the appellee's position that the District Court properly held and determined that it had no jurisdiction to determine the merits of this matter and, therefore, the sole question for this Court to consider and decide is whether the District Court had jurisdiction.

**APPELLEE'S REPLY TO SUMMARY OF ARGUMENT AND
ARGUMENT OF APPELLANT.**

On page 13 of appellant's brief, he argues that appellee filed an answer and engaged in the trial of the case and that it, therefore, "*submitted to the jurisdiction of the Court.*" Appellee did not, by appearing at the trial of this matter, waive any jurisdictional questions. The United States left "*all questions of jurisdiction to the court.*" (Ap. 11.) As is well known to this Court, Admiralty practice is extremely liberal in permitting seamen to amend their libels to conform to the proof and appellee did not at any time during the course of the entire trial of this cause, right up to the last minute thereof, know what testimony or other evidence would be offered by appellant to prove facts necessary to vest jurisdiction in the District Court. Indeed, after submission and decision by the District Court, appellant endeavored to supplement his then defective case with the necessary jurisdictional facts. The motion, in an attempt to accomplish this end, was properly denied by the District Court. Appellant in his brief confuses the issue of "jurisdiction" with that of "venue" and indeed on page 13, he claims that appellee submitted to the jurisdiction by appearance and thereafter states on the same page that the prerequisite as to jurisdiction contained in the Suits in Admiralty Act are merely questions of venue rather than jurisdiction. He, thereafter, relies on the so-called jurisdictional provisions of the Jones Act, which we have heretofore shown to this Court in the matter of *Kakara v. United States*, 1946 AMC 1552 were superseded by Public Law 17,

which confines libellant seamen in the employ of the United States to the jurisdictional limitations contained in the Suits in Admiralty Act, which are absolute and prerequisites to jurisdiction.

The same counsel as appearing for appellant argued in the case of *Kakara v. United States* (supra), that the provisions of the Jones Act superseded those of the Suits in Admiralty Act and urged that the three-year period of limitation, presumably provided for by the Jones Act controlled rather than the two-year provisions found in the Suits in Admiralty Act. This Court in refusing to follow such proposition held:

“However, we are of the opinion that with due regard to these principles of construction (Cf. *White v. United States*, 305 U.S. 281, 292), and assuming that the Jones Act now has a three-year statute of limitation, Congress in Public Law No. 17 intended the two-year statute of limitation to apply. *Appellant's contention that the limitation provision of sec. 5 does not apply would require a holding that the limiting provisions of the Act do not apply.* The ‘rights’ and ‘privileges’ of seamen include the right to the remedy of an action ‘in rem’ against the vessel for injuries arising from her unseaworthiness and under the Jones Act, and to the remedy of a suit at law in the state or federal courts, including remedy of trial by jury. It cannot be contended that despite its provisions that seamen’s rights are to ‘be enforced pursuant to the provisions of the Suits in Admiralty Act,’ Public Law No. 17 enlarged that Act to give to seamen as against the United States all these other remedies available to them. We are unable to see why a remedial extension of the

two-year statute of limitation of the Suits In Admiralty Act to three years should be singled out from these other remedies as alone conferred by Public Law No. 17. Cf. *Crescitelli v. United States*, 1946 AMC 655 (D.C.E.D. Pa.), decided April 26, 1946; *Piastik v. United States*, 1944 AMC 1350; *Keil v. United States*, 1946 AMC 653 (D.C.D. Md.), decided April 5, 1946.

The decree is affirmed.” (Italics ours.)

To the same effect, see also *Crescitelli v. United States*, 159 Fed. (2d) 377 (C.C.A. 3rd), wherein the Third Circuit Court of Appeals in concurring with this Court stated as follows:

“We are impressed by the point made in the Ninth Circuit opinion that if the time limitation provision of Section 5 of the Suits in Admiralty Act does not apply, such a holding would require ‘*that the other limiting provisions of the Act do not apply.*’ We do not think it would be seriously contended, for instance, that a seaman could insist on a libel in rem of a vessel belonging to the United States, or that he could sue the United States in any State or Federal District Court, or that he could insist on a jury trial. In other words, we think Congress meant what it said when, in the Clarification Act, it said that the rights to be pursued by an American seaman against the United States were to be pursued as prescribed by the Suits In Admiralty Act. We think there is no more reason to disregard the time provisions in the Suits in Admiralty Act than any others. Affirmed.” (Italics ours.)

The requirements contained in the Suits in Admiralty Act to the effect that such suits shall be brought in the District Court of the United States for the District in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, are additional jurisdictional requirements to the bringing of the suit within two years, as is also required by said Act, and there is no reason why each of these requirements should not have equal force. None is of less importance than the others and each is jurisdictional.

Appellant, on page 20 of his brief, has quoted from the House of Representatives Report No. 107 of the 78th Congress, 1st Session, in an effort to show that it was the intent of Congress that all rights had by seamen under the Jones Act shall apply without reference to the Suits in Admiralty Act. The verbiage quoted by appellant himself shows conclusively that Congress had no intent other than that such actions would be controlled by and be subject to the Suits in Admiralty Act.

Additionally:

House of Representatives, 78th Congress, 1st Session
Report No. 107, 1943 AMC p. 623:

“The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to

privately employed seamen. *The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act.* The procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purpose of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration.” (Italics ours.)

Appellant on page 14 of his brief claims that the District Court in hearing this matter put all the parties to the trouble and expense of litigating the case only ultimately to tell them that they ought to be relegated to the proper District Court. It is the belief of appellee that any fault in this connection is chargeable solely to appellant himself. He was the moving party in this litigation and the one who failed to prove jurisdictional facts if they existed.

At this point we think it appropriate to remind this Court that appellant had more than three months' time following the final decree within which to file a libel against the United States in the proper district where such Court would have had jurisdiction.

All of the following cases cited by appellant with the exception of *Carroll v. United States*, 133 Fed. (2d) 690, which fully supports appellee, involve questions of jurisdiction under the Jones Act alone:

Brown v. C. D. Mallory & Co. (CCA 3rd), 122 Fed. (2d) 98;

Carroll v. U. S. (CCA 2nd), 133 Fed. (2d) 690;

Leffelland v. Detroit & Cleveland Nav. Co. (DC NY), 16 Fed. (2d) 1011;

Villard v. U. S. Shipping Board Emergency Fleet Corp. (DC NY), 1 Fed. (2d) 570;

Caceras v. U. S. Shipping Board Emergency Fleet Corp. (DC NY), 299 Fed. 968.

All were brought under the Jones Act alone and all were against private employers and none of them involved the jurisdictional questions presented by the enabling provisions of Public Law 17, upon which appellant himself relies for his cause of action in this case and without which he would have no cause of action whatever against the United States. (Ap. 4.) None of the cited cases are, therefore, applicable.

The appellant relies upon the case *Jarnvagsstyrelsen v. United States* (19 Fed. (2d) 761). This case involved a libel brought by a Swiss corporation with no office or place of business or agent in the United States, and thus left libelant without residence within

the United States and consequently without a forum in which to prosecute his claim. It is, therefore, substantially and radically different from the present cause. Judge Learned Hand, vigorously dissenting, held:

“The libel did not allege that the ship was within the United States, a jurisdictional averment under *Blamberg v. U. S.*, 260 U. S. 452, of which there could be no waiver by appearance or otherwise, since it went to the power of the court.”

In the *McGhee case v. United States*, 1946 AMC 487, the Second Circuit held that the libelant, an alien seaman who had no residence in the United States and whose ship had been sunk at sea might bring suit in any District. To have held otherwise would have, of course, completely deprived McGhee of any forum in which to prosecute his claim. The Court went to some pains to point out that alien seamen seldom, if ever, “resided” in the United States. It is obvious in the *McGhee* case that the vessel which was sunk could never be in the jurisdiction of the District Court. It is not believed that the Circuit Court could have reached any other decision under these special facts, none of which were present in this cause.

Appellant has cited and relied on the case of *Carroll v. United States* (supra), which stands clearly for the principle advocated by appellee that the full requirements of the Suits in Admiralty Act and Public Law No. 17 must be fully and exactly complied with in respect to the filing of the libel in the district of residence of the libelant or in the district in which the vessel is located at the time of the filing of the libel.

After discussing at considerable length the fact that libelant Carroll did not file in the district wherein the vessel was located, and further considering what constituted his residence, the Court decided:

“The Judge should have dismissed the libel as to the United States, either because it lacked substantive jurisdiction, or because the suit was brought in the wrong district.”

Following the dismissal of the United States from the action, the Court considered the judgment against the General Agent on the authority of *Brady v. Roosevelt Steamship Company*, 317 U.S. 575, 63 Sup. Ct. Rep. 425, 87 L.Ed. 471.

The leading case in the United States on the jurisdictional questions here presented, we believe, is that of *Blamberg Bros. v. United States*, 260 U. S. 452, 67 L. Ed. 456. In that case a libel was brought for recovery of certain cargo damage. The United States, as in this action, answered on the merits. The respondent alleged, among other things, that it was advised that the barge was in Havana and had no knowledge when it would arrive within the jurisdiction of the Court. The libelant claimed under the facts as alleged that under the Suits in Admiralty Act, a right to bring a libel *in personam* was created as a substitute for a libel *in rem*, and that the presence of the barge in the jurisdiction of the Court was not essential to such jurisdiction *in personam*. The Court said:

“The District Court, on the facts stated, held that it was without jurisdiction, under this statute, to entertain a libel in personam against the United States. We agree with that holding * * *”

and further held in closing their opinion:

“All we hold here is that the District Court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit in personam against the United States as a substitute for a libel in rem when the United States vessel is not in a port of the United States or of one of her possessions.”

A case exactly in point is that of *Abbott v. United States of America*, 1945 AMC 728. The libellant, a resident of either Nova Scotia or Boston, Massachusetts, and whose only New York residence was while hospitalized, brought suit in the New York District Court. The Government answered as was done here, and the appellant claimed, as is now being done before this Court, that by pleading to the merits respondent had waived his objections as to what was called “mere venue.” Judge Knox, in dismissing the libel, held as follows:

“It is argued, nevertheless, that his non-residence here is at most a mere matter of venue, and that respondent, by pleading to the merits, has waived objection thereto. (Commercial Trust Company v. U. S. Shipping Board, 48 F. (2d) 113; Kunglig Jarnvagsstyrelsen v. United States, 1927 AMC 866, 19 F. (2d) 761.) The general rule that I am thus asked to follow is, I think, inapplicable here. Respondent’s response to libellant’s averment of residence in this district put a material fact in issue, and it, if libellant is to prevail, like other affirmative and material allegations of the libel, must be proved.

In other words, the fact that libelant did not reside within this district did not appear on the face of his libel, and respondent was thus in no position to raise the question before the date of trial. (See *Roberts v. Lewis*, 144 U.S. 653.)

* * * On this state of facts, this case falls squarely within the ruling of the Appellate Court of this Circuit in *Carroll v. United States*, 1943 AMC 339, 133 Fed. (2d) 690, where, following *Blamberg Bros. v. United States*, 260 U. S. 452, 1923 AMC 50, it was held that a condition of substantive jurisdiction in suits under the Suits in Admiralty Act is that the vessel should be within this country when a libel seeking to hold the United States is filed. If it be, as the court intimated, that this difficulty might possibly be overcome by dispensing with a new libel if the ship were within the country at the time of trial, it appears that the *Beauregard* was not then here. But assuming that the ship's presence at some other port during the pendency of the libel conferred substantive jurisdiction on this court, the venue of the suit is wrong, and the libel must be dismissed for lack of jurisdiction.

Libelant's argument that *Carroll v. United States* was erroneously decided falls upon ears that necessarily must be deaf."

In the case of *Barnes v. United States*, 67 Fed. Supp. 571 (S.D.N.Y.), respondent, United States of America, challenged the libel on the ground that the Court was without jurisdiction since the libelant was not a resident of the district and the ship upon which the deceased seaman was injured was not within the

jurisdiction when the libel was filed. The libel was brought under the Suits in Admiralty Act. The Court after considering *McGhee v. United States*, *supra*, *Sawyer v. United States*, 66 Fed. Supp. 271, and *Carroll v. United States*, *supra*, stated at page 573:

“It follows that the exceptions must be sustained as to the United States and the libel dismissed; and by reason thereof, in view of Section 2 of the Suits in Admiralty Act, the libel must likewise be dismissed as against the War Shipping Administration.”

The questions of law decided by this case are identical with those presently before the Court.

In the *Anna E. Morse*, 287 Fed. 364, the Court stated:

“For these reasons I feel constrained to decline to follow the opinion in the *Isonomia* case, however much I respect the ability of the court rendering it. My conclusion is that where the vessel is alleged to be at a place shown to be within the jurisdiction of the United States, the libel may be filed in any district in the United States, where a party resides or has its principal place of business, or in which the vessel or cargo charged with liability is found. This is strictly in accordance with the opinion of the Supreme Court in *Blamberg Bros. v. United States*, 43 Sup. Ct. 179, 67 L. Ed (Jan. 2, 1923), where the court says:

“‘All we hold here is that the District Court was right in construing the second section of the Suits In Admiralty Act not to authorize a suit in per-

sonam against the United States as a substitute for a libel in rem where the United States vessel is not in a port of the United States or of one of her possessions.' ”

The case *Nahmeh v. United States*, 267 U.S. 122, 69 L.Ed. 537, held each of the requirements of the Suits in Admiralty Act to be jurisdictional and comments at length upon the ruling of *The Isonomia*, 285 Fed. 516 (CCA 2nd), which held that the three possible places of jurisdiction under the Act should not be held to be cumulative but should be considered distributively.

This case does not in any sense stand for the proposition advocated by appellant. The Supreme Court was fully cognizant of the jurisdictional requirements of the Suits In Admiralty Act, which is clearly demonstrated by the following appearing in its opinion:

“The opinion in the *Isonomia* case was carefully prepared, but we think that the rule as to a strict construction of the language of statutes providing for suits against the United States was there carried too far. In taking away what was then the law, namely, the right of claimants to sue merchant vessels of the United States as if they were private vessels, Congress was evidently anxious (126) to consult the convenience of intending libelants as far as it could, and as the United States was present every where in the United States, it names as the proper place for suit either the place of the residence of the parties suing, or of any one of them, or their principal place of business, or where the vessel or cargo charged with liability was found.”

The Court finally concluded:

“We think, therefore, that the suit brought in the district where the libelant resided was a suit brought in accordance with § 2, even though it would have been an action in rem between private parties, and that it made no difference where the vessel then was, *provided only that it was within the jurisdiction of the United States.*” (Italics ours.)

It can be stated for a certainty that in this case the Supreme Court has held that such libels as the instant one *must* be brought in the district where the libelant resides and only when the vessel is within the jurisdiction of the United States. The libel also could have been brought in any district where the vessel was found irrespective of libelant’s place of residence.

In *Metaxas v. United States*, 68 Fed. Supp. 667, it is stated:

“Clearly venue in the suit at bar is properly laid in this Court if (1) the libelant resides in the district, or (2) has his ‘principal place of business in the United States’ in the district, or (3) the vessel was found in the district at the time the libel was filed. Thus Congress has in express words granted to American Seamen the privilege of suing the Government in any one of possibly three different districts—whichever best suits the convenience of the libelant. *Nahmeh v. United States*, supra, 267 U.S., at page 126, 45 S.Ct. 277, 69 L.Ed. 536.”

To the same effect, see *Artell v. United States*, 286 Fed. 165, and *The Elmac*, 285 Fed. 665.

Appellee believes that the case of *Sawyer v. United States of America*, 66 Fed. Supp. 271, considers the points of law herein involved more fully than do any others. A full and intelligent discussion is had of all of the then relevant reported cases including those of *The Isonomia*, 1923 A.M.C. 132 (2 CCA, 1922), 285 Fed. 516; *Blamberg Brothers v. United States*, 1923, 260 U.S. 452, 1923 A.M.C. 50; *Cross v. United States* (SDNY, 1923), 1923 A.M.C. 468, 8 Fed. (2d) 86; *Nahmeh v. United States*, 1925, 267 U.S. 122, 1925 A.M.C. 457; *Eastern Transportation Company v. United States*, 1927, 272 U.S. 675, 1927 A.M.C. 174; *Kunlig Jarnagsstyrelsen v. United States*, 1927 A.M.C. 866, 19 Fed. (2d) 761 (2 CCA, 1927); *Carroll v. United States*, 1943 A.M.C. 339, 133 Fed. (2d) 690, 692 (2 CCA, 1943); *Sportiello v. United States*, 1944 A.M.C. 970 (EDNY, 1944), 55 Fed. Supp. 551; *McGhee v. United States*, 1945 A.M.C. 714, and *Abbott v. United States*, 1945 A.M.C. 728. In this case, libelant, a seaman, claimed damages as a result of certain injuries allegedly suffered on the Samuel F. Miller as a result of the rolling and pitching of the vessel. In his libel, as in the instant matter before the Court, he did not disclose whether or not he was a resident of the Southern District of New York and also was silent on his place of business. The libel contained no article alleging that at the time of filing of the libel the ship was within the territorial waters of the United States. In the course of the hearing, it developed that the libelant was not a resident of the district and that the vessel was not in the Port of New York when the libel was filed.

Amongst others, the Court posed these all-important questions:

“2. When the statute talks about the district in which a suit in Admiralty may be brought against the Government (46 U.S. Code 742; ‘the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found’) was it setting up a limitation on jurisdiction over the subject matter, or was it merely defining venue?”

“3. If the statutory language concerning the proper district for the commencement of the suit is not jurisdictional, does a respondent waive the point by pleading to the merits, when the libel itself is silent on libelant’s residence or place of business, and on the location of the vessel involved?”

After considering all of the relevant cases as above set forth and commenting upon them at length, the Court stated:

“It surely is legitimate to conclude from this that Congress did not favor the bringing of suit in any district that the libelant might select regardless of the statute, and was unwilling to make it possible for government law officers, either by express assent or by inaction or inadvertence, to permit the suit to proceed in the district of libelant’s choice.”

The Court, in concluding, stated:

“I conclude that a libel under the Suits in Admiralty Act, which contains no averment within the letter of the statute concerning the residence

or place of business of the libelant, or the location of the offending vessel, is completely defective, that, if at the trial the libelant does not bring himself within the statutory language concerning the place of suit the court is without jurisdiction, that no government law officer has a right to waive the point and that the court is under a duty to raise it of its own accord."

As has been stated, appellant here did not prove his residence as being within the district at the time of the filing of the libel, nor did he prove the vessel to be within the jurisdiction of the United States or her possessions.

**THE UNITED STATES DID NOT AND COULD NOT WAIVE
THE QUESTION OF JURISDICTION.**

As has heretofore been pointed out, all questions of jurisdiction were reserved to the Court, and until all evidence was heard the jurisdiction or lack thereof of the Court could not be determined. As pointed out in *Abbott v. U. S.*, supra—

"It is argued, nevertheless, that his non-residence here is at most a mere matter of venue, and that respondent, by pleading to the merits, has waived objection thereto. *Commercial Trust Company v. U. S. Shipping Board*, 48 F. (2d) 113; *Kuniglig Jarnvagsstyrelsen v. United States*, 1927 AMC 866, 19 F. (2d) 761. The general rule that I am thus asked to follow is, I think inapplicable here. Respondent's response to libelant's averment of residence in this district put a material fact in issue, and it, if libelant is to prevail, like

other affirmative and material allegations of the libel, must be proved.

“In other words, the fact that libelant did not reside within this district did not appear on the face of his libel, and respondent was thus in no position to raise the question before the date of trial. See *Roberts v. Lewis*, 144 U.S. 653.”

The case of *Roberts v. Lewis*, 144 U.S. 582, states:

“* * * Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court.”

and also:

“* * * The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the

citizenship of the parties. *Continental Ins. Co. v. Rhoads*, 119 U.S. 237 (30:380)."

The case of the *Eastern Transportation Company*, 272 U.S. 675, does not lay down any such rulings as are claimed for it by appellant nor is it any way relevant in the instant matter. The case merely holds that the sovereignty of the United States raises a presumption against its suability unless it is clearly shown, and further holds that the United States is liable for injuries done to a merchant vessel resulting from failure to mark a wreck.

Appellant cites the case of *Commercial Trust Company v. United States Shipping Board, Emergency Fleet Corporation*, 248 Fed. (2d) 113, as standing for the proposition that "an action under the Jones Act could be maintained against the shipping board wherever it was resident." The case involved the collection of a maritime loan and that it is not here in point is obvious.

The cases of *Caceres v. United States Shipping Board, Emergency Fleet Corporation*, 299 Fed. 968, and *Leon v. United States Shipping Board, Emergency Fleet Corporation*, 286 Fed. 681, as well as *Panama Railroad v. Johnson*, 289 Fed. 964, involved only the Jones Act, standing alone, and the jurisdictional requirements imposed by the Suits In Admiralty Act were not involved or before the Courts, as is here the case.

It has been stated on page 30 of appellant's brief that in the case of *Blamberg Bros. v. United States*,

supra, the Court did not have occasion to consider the question of waiver as to venue. What the Court did decide, as previously pointed out, was that the question as here was one of jurisdiction rather than venue.

We fail to perceive the relevancy of the case of *Armit v. Loveland* (CCA 3), 115 Fed. (2d) 308, and *Hust v. Moore McCormack*, 90 L.Ed. (Adv. Ops.) 1220, at 1229, to the matter under consideration. The cases in question merely tend to show the Court's liberality in the seamen's favor but we seriously contend and believe that no right can be given where one does not exist nor can jurisdiction be vested contrary to the statutes of the United States.

Appellant devoted much space to the claim that all the privileges without impairment given to the seamen by the Jones Act were preserved by Public Law 17 and its features incorporating the Suits In Admiralty Act. Nothing could be further from the fact or law.

Appellant devotes a substantial portion of his brief to relating the traditional right of seamen under the Jones Act in which Act no reference is made to suits brought against the United States of America. The Jones Act created a right in favor of seamen only against private ship owners. It cannot seriously be contended that this statute in any way waived the sovereign immunity of the United States; therefore, it appears certain beyond any challenge that the Jones Act conferred no right in appellant's favor against the United States of America.

“A cause of action under the Jones Act is based on negligence and when brought against the Government has to be prosecuted in Admiralty, because of the requirement of the Suits In Admiralty Act * * *.” *Desrochers v. United States*, 105 Fed. (2d) 919.

The measure of the liability of the United States to an injured seaman is governed by the principles laid down in the Jones Act, but jurisdiction to hear the cause of action is derived from Public Law 17 and the Suits In Admiralty Act, and the remedies given by said acts are exclusive in all cases where a libel might be filed under it. *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 280 U.S. 319, 74 L.Ed. 451, *Crescitelli, Adm'x. v. U. S. and War Shipping Administration* (supra) and *Keil v. U. S. A.*, 1946 AMC 653.

This libel is brought by virtue of the Suits In Admiralty Act and Public Law 17, and appellant, by the terms of his libel, paragraph VI thereof, relied upon such acts in instituting his action.

Without the Suits In Admiralty Act and the Clarification Act (Public Law 17), neither the libelant, nor any seaman, could acquire or enforce any right arising from personal injuries against the Government. The Suits In Admiralty Act provided for a proceeding in Admiralty against the United States, and the Jones Act thereafter introduced into the maritime law a new set of principles, see *Lindgren v. United States*, 281 U.S. 38; *Johnson v. Fleet Corp.*, 280 U.S. 320, 74 L.Ed. 451, but the extent to which the seaman could

assert his newly-acquired rights against the Government depended entirely upon the conditions upon which the sovereign had given its consent to be sued, and that consent was to be found in the Suits In Admiralty Act and Public Law 17, and not elsewhere. It is clear that, as against the Government, the seaman did not receive the benefit of every provision of the Jones Act. For example, he did not become entitled to a trial at common law by a jury in a suit against the United States in any Court but was restricted to the enforcement of his rights by a proceeding in Admiralty. Furthermore, he is now required to file a written claim pursuant to Public Law 17, and the United States has sixty days within which to act upon said claim, before a libel can be commenced. These requirements were, of course, not necessary under the Jones Act. It is crystal clear that the "rights" referred to in Public Law 17 are rights against the Government, and such "rights" are by the terms of Public Law 17 expressly subject to the two-year limitation provided by the Suits In Admiralty Act which require that libellant bring such "suits * * * in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found * * * ."

Piastik, Admx. v. United States of America,
1944 AMC 1350;

Keil v. United States of America, supra;

Kakara v. United States of America, supra.

It will be observed that it has been held that the limitations provided for by the above-quoted Suits in Admiralty Act rather than the seamen's rights under the Jones Act are controlling in a case of this nature.

We believe that it has been shown that the jurisdictional requirements contained in the Suits in Admiralty Act are conditions absolute and precedent which must be met without qualification before jurisdiction is vested. Unless and until such requirements, and each of them, are met, the District Court has no jurisdiction to entertain a cause of libel against the United States. Being conditions absolute and precedent, they are jurisdictional in nature and consequently can not be waived.

We contend that if the terms of the sovereign's consent to be sued are not complied with, the Court is without jurisdiction.

In *Phalen v. United States*, 32 Fed. (2d) 687 (C.C.A. 2nd), in reversing the decision of the trial Court, the Circuit Court of Appeals stated:

“Jurisdiction may be challenged at any stage of the proceedings. *Panama Ry. Co. v. Johnson* (C.C.A.), 289 F. 964, affirmed 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. The Public Vessels Act grants jurisdiction against public vessels which had been theretofore denied. Such a grant of jurisdiction must be clearly shown, and doubt as to the construction of the provisions of the statute granting the same will be resolved in favor of the government.”

In *Munro v. United States*, 303 U.S. 36, 82 L.Ed. 633:

“Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reid v. United States*, 211 U.S. 529, 538, 53 L.Ed. 313, 315, 29 S.Ct. 171.”

In the case of *Lynch v. United States*, 80 Fed. (2d) 418 (C.C.A. 5th), cert. denied, 298 U.S. 658, 692, the plaintiff brought an action against the United States on a War Risk Insurance Policy which policy provided that suit on the policy must be brought within a certain period of time. The action against the United States was dismissed on the ground that the failure to institute the action within the permitted time was jurisdictional and could not be waived. In its decision, the Court stated at page 419:

“The United States Government has the sovereign right to fix the terms under which it consents to be sued. It has done so in this instance, and has not authorized the Veterans Administration or any officer of the government to alter the provisions or waive the limitation imposed. The requirement for timely institution of this action constitutes a jurisdictional condition precedent which may not be waived, or abrogated by estoppel, and which the plaintiff was required to show compliance with in order to make a prima facie case. Statutes of similar provisions have been determined so to be.”

It was further stated in *Lynch v. United States*, *supra*, at page 420:

“It is thus made very clear that the holding of the commission was, not that, having jurisdiction over the claim upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional, and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

“We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion.”

In *Minnesota v. United States*, 83 L. Ed. 235, at page 241:

“Minnesota contends that Congress has authorized suit against the United States. It is true that authorization to condemn confers by implication permission to sue the United States. But Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought. This suit was begun in a state court. The fact that the removal was effected on petition of the United States and the stipulation of its attorney in relation thereto are facts without legal significance. Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give

to any court jurisdiction of a suit against the United States.”

In *United States v. Shaw*, 84 L. Ed. 888, at page 892:

“No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts. The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.”

To the same effect, see:

Stanley v. Schwalby, 40 L. Ed. 960, at page 965.

In *The Isonomia*, *supra*, at page 520:

“In interpreting the Act permitting as it does a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and, if Congress in certain cases gives its consent, the courts are confined to the letter of the statute which expresses such consent * * * And all the provisions of such statute are jurisdictional. As the liability and the remedy are created by the statute, the limitations of the remedy are regarded as limitations of the right.”

Admittedly, the Supreme Court criticized portions of the decision of the Circuit Court of Appeals in

The Isonomia case but not with reference to the proposition of law set forth in the above quotation.

In *American Jurisprudence*, 54, at page 643:

“Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Federal Government is submitted to the courts for judicial determination, and the right to sue is limited to precisely those cases, both in regard to parties and the cause of action, as Congress may prescribe. In order to maintain a suit against the United States one must bring himself clearly within the terms of some statute authorizing suits of the character which he seeks to prosecute; otherwise, the court cannot exercise jurisdiction. Permission of the United States to be sued will not be implied, and statutes granting consent to suit are strictly construed, and are not to be extended beyond their plain language.”

We do not believe the arguments of appellants, with respect to this case being governed only by the Jones Act and subject therefore only to the requirements of the Jones Act, are worthy of a further reply. It is obvious and fundamental as we heretofore have pointed out at length that without Public Law 17 incorporating the Suits in Admiralty Act, the libellant would have been without cause of action. Indeed in his libel the appellant claims jurisdiction pursuant to the terms of the Suits in Admiralty Act.

THE QUESTION OF A TRIAL DE NOVO BY THIS COURT.

On page 33 of brief, appellant claims the right of this Court to try this case *de novo* and asks a decree for libellant if the records indicate such a decree is in order. In support of this proposition, he cites only the following cases:

Brooklyn Eastern District Terminal v. U. S.,
287 U. S. 170, 73 S. Ct. 103, 77 L. Ed. 240;

Linquist v. Dilkes (CCA 3rd), 127 Fed. (2d)
21;

Peterson v. Crickett Shipping Co. (CCA 9th),
71 Fed. (2d) 61.

In all of the cases cited by appellant, full hearings were had in the District Court, in which full findings of fact were made. In none of the cases did the Circuit Court of Appeals pass upon the facts in the first instance and without the District Court first having done so. Appellant in effect asks this Court to sit as a trier of the facts in the first instance under the guise of calling such as first factual adjudication trial *de novo*. A search of the authorities reveals no such successful attempts. This Court is not in a position to judge the credibility of the witnesses which appeared before the district judge, some of whom were in conflict. This Court does not have the opportunity to see the witnesses and judge their appearance, manner or credibility and is thusly deprived of all these important factors involved in a factual adjudication. To appellee the term "de novo" means:

"Anew; afresh; a second time. A venire de novo is a writ for summoning a jury for the sec-

ond trial of a case which has been sent back from above for a new trial." (Black's Law Dictionary 3rd Rev., p. 769.)

Also:

"Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a venire de novo is awarded, in order that the case may again be submitted to a jury." (Bouvier's Law Dictionary, 3rd Rev., p. 769.)

Both of the foregoing definitions imply the necessity for a full determination by a lower Court before there can be a *de novo* adjudication. A trial *de novo*, therefore, cannot be by its very nature a first adjudication such as is here sought.

As heretofore stated, the appellee does not concede that this Court by virtue of its *de novo* powers should, or will, sit as the initial trier of fact in this case. Should, however, this Honorable Court, after considering the jurisdictional question, in its wisdom decide to sit as a trier of the fact in the first instance, we submit the following brief reply to the voluminous statement of facts and evidence appearing in the appellant's brief.

Should this Court have occasion to consider the evidence, we respectfully refer the Court to pages 51 to 60 of this brief, wherein the pertinent facts are considered and some of the testimony quoted.

APPELLANT IS NOT ENTITLED TO RECOVER DAMAGES.

While we concede that in some cases liability can be imposed upon the ship owner because of the *known* vicious, brutal and violent character and propensities, we do not concede that such is the case in the instant matter. The cases cited by the appellant are not factual in point.

In "*The Rolph*", 299 Fed. 52 (CCA 9th), the cruelties of the mate were well known and demonstrated prior to the commencement of the voyage. The Court in "*The Rolph*" stated:

"From these and many other decisions, in which the courts have discussed the duty of the ship owner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage where the mate is a man known to be of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel, and uncalled-for assaults upon sailors."

In the *Kyriakos v. Goulandris*, 151 Fed. 132, the Court found Bouritis, the assaulting seaman, to be a marijuana addict. He had threatened the libellant on many occasions and the Court found that the master knew, or at least should have known, the assaulter was a man of vicious and violent character and irrational. The case is replete with instances where the libellant had been repeatedly threatened and abused, he previously having appealed to the master for help and protection which was denied him.

In the case of *Yukes v. Globe S. S. Corporation*, 107 Fed. (2d) 888, which is cited erroneously by the libel-

ant in support of his claims, the Court denied recovery to the appellant because the assault involved was not in the furtherance of the ship's business. The Court stated:

“The difficulty with the appellant's case is that there is nothing to connect Cope's assault upon him with discipline or the ship's business, or to bring it within the actual or constructive scope of his authority.”

The Court further held that the assertion of the assaulter that “I am an officer” added nothing to the case. Thus, it is clear that all assaults are not compensable and recovery cannot always be had against the ship owner as is blatantly claimed by appellant.

In *Koehler v. Presque-Isle Transportation Co.*, 141 Fed. (2d) 490 (C.C.A. 2nd), it was determined that assaulter was one of a vicious and belligerent nature and likely to inflict bodily harm on other members of the crew and such facts were known to officers of the ship, or should have been known to them, in the exercise of ordinary diligence. In that case a serious assault had been made upon the libelant in the presence of one of the ship's officers and consequently there could be no question but that the vicious, belligerent and harmful propensities of the assaulter were known to the ship's officers.

In *Nelson v. American-West African Line, Inc.*, 86 Fed. (2d) 730 (C.C.A. 2nd), it was held that in order to permit recovery by a seaman who was assaulted in bed by a drunken boatswain, before recovery could be allowed, the boatswain must be deter-

mined to have acted within the scope of his authority in the furtherance of the ship's business.

It is obvious that the facts of the instant case do not bring us under the law laid down by any of the foregoing cases. Howland was not of a violent, belligerent or vicious nature and he had no such propensities, and the record is entirely devoid of any evidence to substantiate the statements contained in appellant's brief, as will be shown by the evidence later quoted herein.

While the vicious propensity rule applies with equal effect to officer and fellow seaman, we believe it clear that in assaults committed by fellow seaman of equal rank, no vicious propensities having been shown, liability does not attach to the vessel. Such assaults to be compensable in damages against the ship owner must be committed by superior officers in furtherance of ship's business.

Howland, a seaman in the United States Navy, was not a superior officer to appellant, nor did he outrank him, nor was he a fellow servant, nor was either of them subject to the control or under the authority of the same officer. Howland was under the sole and exclusive jurisdiction of the United States naval officer in charge of the armed guard party. The master of the vessel had no jurisdiction over the naval party, including Howland. (Tr. Vol. II, p. 141.)

In the case of *Lykes Bros. S. S. Co. v. Grubaugh*, 128 F. (2d) 387 (C.C.A. 5th), cited and relied upon by appellant, at page 391, the Court fully considers

the question of the shipowner's responsibility in "assault" cases. This excellently considered opinion states as follows:

"The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in *Medlin Milling Co. v. Boutwell*, 104 Tex. 87, 133 S. W. 1042, 34 L.R.A., N. S., 109, and *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. In *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and *Alpha Steamship Corp. v. Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, applying to assaults on ship-board, the rule of the *Green* case, the Supreme Court declares, that the employer may be liable under the Jones Act only when the assault is committed by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of those cases the assault was by a superior officer upon a subordinate employee whom the assailant had the power and authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his su-

perior or by the head of one department upon the head or an employee of another department over whom the assailant has no authority of direction or control. None has held the master liable where as here the assault occurred as the result of anger over matters having nothing to do with the exercise, over the assailed, of authority delegated by the master to the assailant in the discharge of duties with which the master had charged him. It is appellant's position that the case fails both because the engineer had no authority or control over the steward and because if he had, the evidence not only wholly fails to establish that the assault was committed in attempting to carry out the master's business but on the contrary it affirmatively shows that it was a personal quarrel to vent the drunken spleen of the engineer."

The foregoing case was reconsidered on rehearing in 130 Fed. (2d) 25, and was affirmed; additionally, maintenance was awarded. The opinion was not otherwise modified.

This same subject was given extensive treatment by the Second Circuit Court of Appeals in the case of *Bonsalem v. Byron S. S. Co.*, 50 F. (2d) 114 (C.C.A. 2nd). At page 115, the Court states as follows:

"The ship or shipowner is not liable for injuries received by a seaman from an assault committed outside the scope of the employment of those on the vessel who are alleged to have assaulted him. This appellee was assaulted without provocation, and the assault was not committed by any officer of the vessel in furtherance of the appellant's business. The appellant did not au-

thorize the officers of the ship to beat and assault him without cause or for a reason unconnected with the navigation of the ship.”

To the same effect, see *Pittsburgh S. S. Co. v. Scott*, 159 F. (2d) 373, C.C.A., Sixth Circuit (1947), at page 376:

“A willful assault perpetrated ‘to satisfy the temper or spite of the employee’, not done in an attempt to further the employer’s business, does not render the master liable for his servant’s wanton acts. *Lykes Bros. S. S. Co. v. Grubaugh*, 5 Cir., 128 F. (2d) 387.”

See also *Brailas v. Shepard S. S. Co.*, 152 F. (2d) 849 (C.C.A. 2nd), wherein the applicable law is carefully set forth as follows:

“* * * It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master’s business; the fact that the injury is done during the continuance of employment is not enough. *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Bonsalem v. Byron S. S. Co.*, 2 Cir., 50 F. 2d 114; *Lykes Bros. S. S. Co. v. Grubaugh*, 5 Cir., 128 F. 2d 387, modified on rehearing 5 Cir., 130 F. 2d 25.
* * * * *

“* * * Even assuming, however, as plaintiff contends, that Dolanides stabbed him in an effort to regain possession of his position at the throttle, the defendant company cannot be held responsible for Dolanides’ Act. An assistant engineer can hardly be said to act in furtherance of his master’s business when he assaults the

chief engineer as the latter attempts to take control at a time of emergency. The case on its facts is clearly distinguishable from cases relied on by the plaintiff where a superior officer injured a seaman in the act of prodding him to work. *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S. S. Corp. v. Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Nelson v. American-West African Line*, 2 Cir., 86 F. 2d 730, certiorari denied *American-West African Line v. Nelson*, 300 U. S. 665, 57 S. Ct. 509, 81 L. Ed. 873. Hence the court committed no error in refusing to submit this issue to the jury and in refusing plaintiff's requests to charge based upon the contrary theory."

The cases of *Alpha S. S. Corp. v. Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, and *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, both involve cases under the Federal Employers Liability Act. In the former case of *Alpha S. S. Corp. v. Cain*, recovery was based upon an assault inflicted upon an employee by his superior superintendent in the course of reprimanding the plaintiff for tardiness and compelling him to work. In the *Jamison v. Encarnacion* case, a foreman struck an employee in the furtherance of his master's business for the purpose of hurrying him about his work. Neither case has any application whatsoever to the facts in the instant matter.

None of the cases cited by appellant on page 41 to and including page 45, of appellant's opening brief, have any application whatsoever to the matter before

this Court, nor do they support the point contended for or by them. None of these cases involve the authority of a master of a vessel in time of war, nor do any of them even comment upon the conflict or difference in the authorities vested in the merchant vessel master and those of United States Naval Armed Force party.

In times of war, it has been necessary to set many ancient traditions and customs aside and this was done in World War II. The merchant marine had no authority over members of the armed naval forces of the United States. This is a matter of which it is believed the Court will take judicial knowledge. We have never at any time heard of a merchant marine master taking over command of naval forces from a naval officer, although unquestionably the reverse has been true on many occasions and the merchant marine was, in the last World War, at all times subject to the control and direction of the naval forces. The only evidence adduced in the District Court on this point was that given by Lt. Commander Cowan, the executive officer of the United States Naval Armed Guard of the Pacific (Tr. Vol. II, page 141) as follows:

“Q. Will you just tell us, Commander, what the relationship was aboard the SS. Escanaba Victory, what the relations were that existed between the members of the Armed Guard Crew of the ship and the Master of the ship and the complement of merchant officers and crew of that ship?

A. The Naval Guard Officer and crew were a separate entity, a separate crew, separate and

distinct from the Master, the mates and the other personnel attached to the Merchant Marine aboard that vessel. The Master of the vessel has jurisdiction over the merchant crew aboard the vessel. The commanding officer of the Armed Guard crew has jurisdiction over the Armed Guard crew in all respects aboard that vessel.

Q. And did the Master of the Escanaba Victory or any of the complement of the merchant seamen officers aboard that ship have any jurisdiction or control whatsoever over the commander of the gunnery crew, or the men under him?

A. Absolutely none whatever.

Q. Did the Master of the ship, or any of the officers of that ship, and I mean the merchant marine officers, have any jurisdiction to reprimand or otherwise give instructions to any member of the gunnery crew?

A. In no manner.

Q. Did the Master or any of the merchant seamen or officers have any jurisdiction to punish a member of the gunnery crew?

A. Absolutely not.

Q. Did the Master or any officer under him on the ship have any jurisdiction or control over the Commander of the gunnery crew?

A. No, sir.

Q. Did the Master have any jurisdiction or did the officers under him have any jurisdiction to discharge, or relieve from duty, temporarily or otherwise, any member of the gunnery crew?

A. No, sir.

Q. Whose jurisdiction was it, or whose right was it to determine whether or not a member of the gunnery crew should stay aboard the vessel, temporarily or otherwise?

A. The Commanding Officer of the Armed Guard Unit.

Q. Did anyone other than the commander of the Armed Guard gunnery crew have the right, power or authority to displace any member of the gunnery crew?

A. No, sir."

And at page 147, lines 3 to 11 inclusive:

"Mr. Hoge. Q. Commander Cowan, did the Master or any of the merchant marine officers under the Master have any jurisdiction or authority to control the commander of the Armed Guard unit or any of the crew members of the Armed Guard unit, acting under him?

A. No, sir.

Q. Did the Master or any of the officers acting under him have any right to supervise the activities of the commander of the Armed Guard unit, or any of the members of the Armed Guard unit under him?

A. No, sir."

And at lines 17 and 21, inclusive:

"Mr. Hoge. Q. Did the Master or any of the merchant marine officers acting under him have jurisdiction or authority to displace the commander of the Armed Guard unit or any man of the Armed Guard unit under him?

A. No, sir."

Much has been said by appellant with respect to his claim that he was a fellow servant of United States Navy Seaman Howland. This Court has previously spoken with respect to the differences between

civilian fellow servants and the relationship of a soldier to his Government.

In the case of *Standard Oil Company of California v. United States*, 153 Fed. (2d) 958 (C.C.A. 9th), (1946), at page 961:

“* * * There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words ‘servant’ and ‘master’ in § 45(c) to include within their meaning the words ‘soldier’ and ‘government.’

In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be the major distinguishing factor between the two relationships. Labor’s many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peacetime a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e.g. Articles 58 and 61 of the Articles of War, 10 U.S.C.A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country and every citizen is a potential soldier under the conscription laws * * *

Thus the fact that this soldier (Etzel) had entered the Army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the

distinctions between soldier and employee at 60 F. Supp. 810. See also *McArthur v. The King (Canada)* (1943) Ex. C. R. 77, (1943) 3 D.L.R. 225.”

A member of the United States Navy is not considered an employee of the United States within the scope of the Suits In Admiralty Act.

Dobson v. United States, 27 Fed. (2d) 807 (C.C.A. 2nd);

Bradey v. United States, 1945 A.M.C. 777.

In the *Bradey* case, a member of the United States Navy was injured in a collision between a United States naval vessel and another vessel which was owned by the United States of America and operated under the familiar form of general agency agreement.

The Court states:

“Whether the ‘Morton’ be deemed a public vessel or merchant vessel, recognition of any right of a libellant to sue the United States of America for damages for decedent’s injury or death even when caused by fault of another ship than decedent’s, is forbidden by the public policy stated in *Dobson v. United States*, 27 Fed. (2) 807.”

The Court in *McArthur v. The King* (1943), 3 D. L. R. 225 (Exchequer Court of Canada), after an exhaustive search of the authorities, concluded that the sovereign was not liable for the act of a member of the Armed Forces while on duty. This authority was cited in *Standard Oil Company v. United States*, *supra*. The Court said on pages 260, 261:

“There is nothing to indicate in any way that the legislature to go beyond the application of the doctrine of employer’s liability to the crown in the field of negligence, or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply. * * * Before the Crown shall be held responsible for the negligence of such persons to whom the doctrine of employer’s liability as understood as between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant, or employer and employee, it will require language in the statute of the clearest and most explicit kind. Any such far-reaching extension of the liability of the Crown would have to be stated in the statute in express terms.”

A search of the authorities has revealed no other cases that even touch upon this subject save and except the case cited by the appellant, *DeWitt v. United States of America*, 1946 A.M.C. 1222, which is a case decided by the District Court of the Western District of Washington. This case is by no means in point. The facts in the DeWitt matter were that the libelant was injured by the alleged negligence of a soldier who was operating the ship’s winches in the course of discharging the vessel at Okinawa. This soldier was replacing and doing the work of a seaman or stevedore and was assisting in the necessary ship’s business of discharging. The Court held that the mere fact that the winch driver also served contemporaneously as a member of the Armed Forces would not

defeat libelant's right to indemnity from the vessel. The Court reasoned that the soldier winch driver was serving in a dual capacity as a member of the ship's company and also contemporaneously as a member of the Armed Forces. The Court further goes on to say:

“In considering and ascertaining whether or not the winch driver at the time, place and environment of the accident was engaged with the injured oiler in maritime duties within the meaning the broad protective provisions of the statutes applicable to this libel, it should be noted that no wartime activities were then being performed by either. The work of each was essentially a post-war maritime service, not dissimilar in character to the duties performed by the injured man and the stevedore, respectively discussed by the Supreme Court in *International Stevedoring Company v. Haverty*, 272 U. S. 50, 1926 A.M.C. 1638.”

Thus, it will be seen that the Court went to great pains to hold that the winch driver was not engaged in wartime activities and that he was doing the work similar to that of the injured seaman or to the stevedore. It may be noted at this point that the case of *International Stevedoring Company v. Haverty*, supra, involved injuries suffered by a stevedore. It will be further noted that the Court found it not necessary to characterize the soldier winch driver as an employee of the United States. It would appear appropriate to inquire as to whether Howland was engaged in wartime activities or the duties of a merchant seaman. Howland, as the record will show, was on roving patrol in time of war. (Tr. Vol. II 107.)

His duties, obligations and orders given him by the United States naval officer in charge of the naval crew were clearly described by Lt. Commander Cowan. (Tr. Vol. II, 146, lines 1 to 26.)

It is apparent that DeWitt in the case of *DeWitt v. United States of America*, supra, was engaged in post-war maritime ship's business of discharging the vessel's cargo. Howland in this case was on active naval duty during wartime and was not engaged in seamen's or stevedore's work in conjunction with the operation of the ship's business. Howland was not replacing or doing the work customarily performed by the ship's personnel or stevedores.

We are unable to comprehend the relevancy of the holding in *Norton v. Warner Co.*, 321 U. S. 565, 88 L. Ed. 931. In this case, the Court decided what constituted the crew of a barge. The naval forces were not aboard the barge and we cannot conceive of any application of that ruling to the matter before this Court. The case arose under the Longshoremen's and Harbor Compensation Act.

Appellant quoted Public Law 17 in an effort to show that it gave to merchant seamen all of the rights they could have had against private ship owners. We believe it clear beyond any doubt that a private ship owner would not be liable to one of its seamen for an assault by a member of the armed forces whether the assaulting member of the armed forces was negligent or otherwise.

The case of *Hansen v. United States*, 12 Fed. (2d) 321, cited by appellant, merely holds that under the Jones Act the defense of negligence of an officer or fellow servant is not a defense. This case likewise has no application to the questions before this Court.

Libelant claims to be entitled to a decree of the United States even if Howland is not found to be a member of the crew. This claim arises, as it will be observed, out of the shooting, the claimed tortfeasor being a member of the United States naval forces. He was not, as we have shown, one of the merchant crew, or a fellow servant of appellant. The United States has never waived its sovereign immunity with respect to torts committed by members of the armed forces. For instance, injuries suffered by members of the public on a military reservation are non-actionable. None of the cases cited by appellant are in point.

The cases of *United States Fidelity Guarantee v. United States*, 56 Fed. Supp. 45, and *Moran Towing and Transport v. United States*, 56 Fed. Supp. 104, and *Marin v. United States*, 65 Fed. Supp. 111, and *The Canadian Aviator, Ltd. v. United States*, 324 U. S. 215, have no application to the case at bar and are not in point.

THE QUESTION OF INSURANCE BENEFITS.

Appellant in his Statement of the Pleadings and Jurisdiction says:

“This is a seaman’s libel in personam for benefits under the Second Seaman’s War Risk Policy

and for damages for personal injuries and maintenance and cure * * *”

On page 5 of the brief under “II. Statement of the Case and Summary of the Evidence,” he says:

“This is a seaman’s libel in personam against the United States, wherein the libellant Earl P. Hoiness seeks the following relief:

‘(1) * * *

(2) For benefits under the Second Seaman’s War Risk Policy in the amount of \$650.
* * * ’”

On page 16 of his brief under “IV, Summary of Argument, D. The Question of Insurance Benefits,” appellant states:

“The United States during the war provided insurance policies for merchant seamen injured while in its employ aboard merchant vessels of the United States as the result of war risks. This case is certainly one covered by the language and intent of these policies. Were it not for the fact that the armed guard of which Howland was a part were aboard the ‘Escanaba Victory’, it is fair to say that libellant would not have been grievously injured as happened here. This certainly is one of the risks contemplated by the insurance policy, particularly if it is given the liberal and remedial construction that should be accorded any statute passed for the benefit of merchant seamen who are peculiarly the wards of the Admiralty.”

Appellant again, under “V. Argument B (4) *Libellant is entitled to recover war risk insurance benefits*,” states:

“It seems clear to us that had it not been for the war the gun crew would not have been aboard the ship. The incident which happened in this case would not have happened and libelant would not have been grievously hurt. * * *”

Appellant then proceeds to quote the provision of the Second Seaman's War Risk Insurance Policy requiring direct and proximate causation by risks of war and warlike operations, and to cite the cases of *Crist v. U. S.*, 1946 A.M.C. 170, and *Murphy v. U. S.*, 1946 A.M.C. 378, in support of the said argument.

It is questioned by appellee that the matter set forth in appellant's brief under the headings “Summary of Argument” and “Argument” can be properly classified as argument. Statements that “This is certainly one covered by the language of the Act, etc.” and “This certainly is one of the risks contemplated by the insurance policy,” hardly warrant such a classification.

As appellant has cited the *Crist* and *Murphy* cases he must have intended to make the “but for” argument on the basis of restraint, to the effect that where a restraint has taken place any loss which subsequently occurs may be fairly attributed to the taking and the party seeking recovery under a war risk policy is relieved from strict compliance with the rule of proximate cause.

It is a fundamental principle of marine insurance that *causa proxima non remota spectatur*, and that the underwriter is liable for no loss which is not proximately caused by a peril insured against.

The rule has been thus stated as follows by the Circuit Court of Appeals of the Second Circuit:

Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F. 976, 987.

“In order to impose liability under the war risk clause policy, all forms of hostilities or warlike operation of whatever kind must consist of some form or kind of hostility or warlike operations which have proximately caused the loss. Remote consequences of hostilities cannot become a recoverable loss, even if they may be said to be proximately caused by something itself ascribable as a consequence of hostilities.”

The case of *Crist v. U. S.*, 1946 A.M.C. 170, was reversed by the Third Circuit of the Circuit Court of Appeals in 1947 A.M.C. 932. The Court considered the subject of restraint at length and in reversing the District Court found that the testimony established that the loss of

“the ‘Maiden Creek’ was not the result of a warlike operation or of any conduct insured against by the war risk policy * * *”

On page 943 the Court quoted from the English case of *Harrisons, Limited v. Shipping Controller*, (1921), 1 K. B. 122, 421 L. Rep. 429, page 131. One sentence is particularly pertinent.

“It seems proper to distinguish between wartime conditions of merchantman traffic and the actual occurrence of warlike operations.”

In *Dennehy v. U. S.*, 15 F. (2d) 196 (S.D.N.Y. 1926), the Court dismissed a libel brought to recover

the proceeds of a World War I seaman's war risk policy and declared:

"The mere fact that in time of war a member of the crew of a merchant vessel, carrying munitions of war, is injured or loses his life and has a policy covering him against 'war risks' does not entitle him or his representatives to recover against the one so insuring is clear, even though a very broad construction be adopted. Injury or death must be the result of a risk of war. The war must be the proximate cause."

See also *Gadsden v. U. S.*, 54 Fed. Supp. 151 (D.C. Md. 1944).

The proper and well-settled rule of construction of the Seaman's War Risk Policy is enunciated in *Bean v. U. S.*, 7 F. (2d) 393 (D. Kan. 1925), where the Court declared, at 396:

"War risk insurance is a special statutory kind of insurance and contracts issued thereunder are not to be interpreted and construed according to the principles of law governing accident insurance or other contracts of insurance. *Sternfeld v. U. S.*, 32 F. (2d) 789 (N.D. N.Y. 1929)."

It seems "clear" to us that a consideration of the facts of this case in light of the above authorities leads to the conclusion that the case is "certainly" *not* one covered by the language and intent of the Second Seaman's War Risk Policy and that it "certainly" is not one of the risks contemplated by the policy, and that appellant is entitled to recover nothing thereunder.

ASIDE FROM JURISDICTIONAL QUESTION THE FACTS AND EVIDENCE OF THE CASE WOULD CLEARLY NOT SUPPORT AN AWARD IN APPELLANT'S FAVOR.

Howland, a seaman first-class of the United States Navy, was a member of the Navy Armed Guard aboard the "Escanaba Victory". Howland was under the direct orders of Lieutenant Mixon of the United States Navy. The vessel was manned and navigated by a merchant crew under the command of a merchant master.

The subject matter of this cause occurred during World War II at a time when all security regulations were in full force and effect and being enforced by the appropriate military authorities.

Howland was sworn into the Navy on December 10, 1942, and was ordered aboard the "Escanaba Victory" by the Navy on June 29th. He received his honorable discharge from the Navy November 25, 1945. (Tr. Vol. II, 101.) Upon discharge, he received a Navy citation for meritorious conduct. On the 16th of January, 1945, when the vessel was at San Francisco, having just completed a voyage to foreign waters, Howland was assigned the 12 to 4 watch by the Naval Officer in command of the Navy party (Tr. Vol. II, 106, 107) and his duties were those of a roving patrol. In the course of Howland's watch, he was directed by Lieutenant Commander Wilson of the United States Coast Guard, to locate a member of the crew, one Holleman, and to produce him before the Lieutenant Commander. (Tr. Vol. II, 108.) Howland's duties as roving patrolman took him about the entire vessel.

(Tr. Vol. II, 112.) During the search for Holleman, Howland looked in the boatswain's forecandle in which there were five or six men. Appellant called Howland an extremely vile name. (Tr. Vol. II, 126, 128.) (Please see record for actual name.) There was no provocation for this conduct upon the part of appellant. Howland merely inquired as to the whereabouts of the party he was seeking. Appellant accused Howland of trying to run the whole ship (Tr. Vol. II, 110), and endeavored to force Howland, who was then on duty, to go down on the dock which Howland properly refused to do. Howland was carrying side arms consisting of a .45 Colt automatic which was standard equipment for roving guards. (Tr. Vol. II, 111.) Appellant at the time knew Howland was on duty and knew that Howland should not be interfered with. (Tr. Vol. II, 39.) During all of the times involved appellant, who had been drinking whiskey, was heavily liquored (Tr. Vol. II, 109, 131), and in addition to the vile name previously referred to, he called Howland a "Communist". (Tr. Vol. II, 39.) Howland thereupon drew his service pistol but later returned it to its holster. Howland then proceeded about his business in search of Holleman down the passageway. Appellant and several other merchant seamen (Tr. Vol. II, 113) who were in an ugly mood and who had been drinking (Tr. Vol. II, 124) followed Howland and still persisted that he fight appellant on the dock. This Howland refused to do. Appellant's companions goaded appellant on, making suggestions that he should take Howland's gun away from him and do certain things with it. (Tr. Vol. II, 111, 112.)

Appellant then grabbed Howland by the jumper and slammed him against the bulkhead. (Tr. Vol. II, 112.) At this time Howland's gun was still in his holster. Following this, appellant called Howland another vile name (Tr. Vol. II, 113) and drew back his left hand in a manner indicating he intended to strike Howland. At this point Howland justifiably drew his side arm and shot appellant. Howland thereafter summoned a doctor and immediately surrendered himself and his gun to his superior officer. Appellant thereafter was taken to the San Francisco Hospital and later to the Marine Hospital, suffering disability for two and one-half months. (Tr. Vol. II, 22, 23.) Prior to entering the United States Maritime Service, appellant was a truck driver by occupation. Upon being released from the Marine Hospital, he obtained work as a bartender and later purchased his own nightclub.

Appellant urges that the record shows Howland had a reputation for violence and that he accordingly should have been restrained. He bases this conclusion solely upon the unsupported testimony of appellant who admitted that he had previously testified before a Naval Court of Inquiry to the contrary (Tr. Vol. II, 49, line 24 to and including 50, line 1):

“Q. But you still feel in your own heart that Howland did not mean to shoot you or shoot the gun off?

A. Yes, sir.”

Appellant admitted that he had no previous altercation with Howland at any time (Tr. Vol. II, 32, lines 2, 3, and 4):

“Q. You never had any fist fight or anything of that sort with Howland during this entire voyage, did you?

A. No, sir.”

Howland had never been reprimanded by anyone. (Tr. Vol. II, 102, 103.) He had never threatened anyone. (Tr. Vol. II, 102, 103.) His attitude was not threatening toward members of the merchant crew and he had never been seen to strike or threaten anyone. (Tr. Vol. II, 131.) Just prior to the casualty, he had been commended for his conduct by the master of the vessel. He was honorably discharged from the United States Navy and received a Navy citation for meritorious conduct. (Tr. Vol. II, 101.) He had never entered into any arguments or fights with any of the members of the merchant crew. (Tr. Vol. II, 104.)

Much is made by appellant of an occasion when it was claimed by appellant that Howland pushed a member of the merchant crew from one of the vessel's life boats, although appellant himself didn't witness the occurrence. The fact of the matter is the shore party was aboard the vessel's small boat at an amusement beach where they engaged in horseplay. (Tr. Vol. II, 104.) There was no fight of any kind. A total of sixteen of the party went overboard, Howland included, who could not swim a stroke. (Tr. Vol. II, 104.) Appellant claimed that Howland was in command of the shore party boats, and would give preference to naval personnel. The fact is that only 50% or 14 in number of the naval crew could go ashore at

any one time. The shore boat carried a total of 35, leaving space for 21 of the merchant crew. (Tr. Vol. II, 105, 106.) Howland was not in charge, nor did he have any control over the shore boats or who entered them. (Tr. Vol. II, 117.)

There is no escape from the fact that Howland was on naval duty at the time of the shooting; however, it is the position of the appellee that appellant was mad at Howland and that he engaged Howland in a personal argument at which time appellant was drunk and the aggressor. The shooting resulted after appellant had threatened and attacked Howland, he first having called him vile and insulting names. Howland acted solely in self-defense. Appellant who had been drinking knew that Howland was on duty and knew that he should not be interfered with (Tr. Vol. II, 35, lines 15 to 19 inclusive):

“The Court. Q. Under what circumstances did the drinking take place? Did you have a bottle among yourselves?

A. There was a full bottle in the boatswain’s forecastle and it was passed around and each one had a drink. That happened about five minutes before the shooting.”

(Tr. Vol. II, 36, lines 11 to 20 inclusive):

“Q. Mr. Hoiness, referring to the matter of your drinking on the ship this particular day. Do you wish to state as a matter of record that you took only one drink?

A. No. I would not say one drink. I would say four or five drinks I had in the boatswain’s focsle after I got back from town.

Q. Do you remember what type of liquor it was?

A. No, I don't. Three Feathers, I believe."

Knowlton, a sailor in the United States Navy, testified as follows concerning appellant (Tr. Vol. II, 131, lines 24, 25, and 26):

"Q. What was his condition, if you could observe it, as to whether or not he was drunk or sober.

A. He had been drinking."

In this regard, Howland testified as follows (Tr. Vol. II, 109, lines 21, 22, 23, and 24):

"Mr. Hoge. Q. I will direct your attention to Mr. Hoiness, the libelant here: What was his condition as you observed it as to intoxication or sobriety?

A. He had been drinking heavily."

Appellant himself testified (Tr. Vol. II, 39, lines 1 to 7 inclusive):

"Q. Assume he was what is known as a roving guard. You know from your experience on that ship that his duties carried him all over that vessel, is that right?

A. Yes.

Q. Now, as a guard connected with the United States Navy on duty carrying side arms, you knew that the man was not to be interfered with in the performance of his duty, didn't you?

A. Yes, sir."

Appellant again testified before a Naval Court of Inquiry (Tr. Vol. II, 39, line 21 to 40, line 3 inclusive) as follows:

“Q. Down by the boatswain’s focsle, what was the nature of the argument that you had with Howland? What was said by yourself and by him?”

A. I guess I called him a Communist or something, the way he tried to run the gun crew on the last trip, which wasn’t any of my business, and started the argument. He was always trying to cause trouble between the gun crew and the merchant crew and that is what the argument started over.”

Appellant further testified as follows (Tr. Vol. II, 42, lines 19 to 24 inclusive):

“Mr. Hoge. Your Honor, I will read from page 76, line 49: ‘Q. After this argument, is it true that Howland walked away and you and four or five men followed him? A. Yes, sir. Q. You were pretty mad at Howland at this time? A. Yes, sir.’ ”

(Tr. Vol. II, 44, line 3 to and including line 20):

“‘Q. Will you tell me again about those four or five men that followed you down the passageway. Who were they and what was your purpose in following the defendant? A. I was just going down more or less to finish out the argument. He was going to turn us in to the Coast Guard for arguing with him, so I went down to ask him if that is what he was figuring on doing, turn me in to the Coast Guard for arguing with him. Q. You testified that you followed him down there for the purpose of finishing the argument, didn’t you? A. I must have. Q. Now, Mr. Hoiness, you knew, to repeat the question I asked you before,

you knew that this man was on duty, on Navy duty, carrying a side arm, a .45 Colt Automatic gun, didn't you? A. Yes, sir. Q. And after this argument that he had had, when you told him to shoot you, he put the gun in the holster, didn't he? A. Yes. Q. And he walked away, didn't he? A. Yes, sir.' "

As to the attitude and intentions of appellant, Howland explained the existing situation as follows (Tr. Vol. II, 124, lines 6 to 11, inclusive):

"Q. Did you think it was necessary to shoot him in order to prevent yourself from being hit?

A. I was not mainly concerned with Hoiness. He was backed up by quite a group of guys that had been drinking and were in a pretty ornery mood.

Q. You were concerned with the other men?

A. I was concerned with all of them."

The opprobrious epithets that were hurled by appellant at Howland (Tr. Vol. II, 126 and 128) were testified to by witness Crandall, an employee of Young's Patrol.

As to the actual physical assault of appellant upon Howland, the following was testified to (Tr. Vol. II, 112, line 6 to 113, line 6 inclusive):

"Q. Where did you go?

A. I was still seeking Holleman under orders of Lieutenant Commander Wilson.

Q. Where did you go?

A. I went down the passageway into the merchant marine mess hall.

Q. Did you find Holleman down there?

A. No, sir.

Q. Then what occurred after that?

A. I was standing at the door in the same position I was at the door in the boatswain's fore-castle and I turned around and Hoiness grabbed me and slammed me up against the bulkhead.

Q. When he grabbed you and slammed you up against the bulkhead, what did you do, if anything? Did you try to get away or grapple with him?

A. He had his right hand holding on to my undress blue jumper. It is quite loose and he had me tied up against the bulkhead.

Q. At this time did you have your gun in the holster?

A. It was in the holster.

Q. And you were on duty as a guard at that time?

A. I was.

Q. You were performing duties that you had been instructed to perform by your commanding officer?

A. That's right.

Q. When he threw you up against this bulk-head, then what happened?

A. He said, 'I will teach you to pull a gun on me, you son of a bitch.'

Q. Then what happened?

A. Then he drew back his left hand which was right opposite to my right hip, in a low position, and I didn't know whether he was going to strike me or take the gun away from me."

For corroboration of this, Knowlton, a sailor in the United States Navy, testified as follows (Tr. Vol. II, 133, line 19 to and including 134, line 4):

“Q. Did Hoiness and Howland meet when they got down to the other end of the alley way, or just state what took place at that time and place?

A. I was standing by the galley and Howland was looking in the mess hall for Holleman. Howland turned around and Hoiness grabbed him by his jumper.

Q. You have the same sort of uniform, haven't you? Demonstrate to His Honor where Hoiness grabbed him?

A. Hoiness grabbed him right up on the jumper around with his right hand and drew back with his left hand and there was something said about a Communist and a son of a bitch and then Red drew the gun and shot him.”

APPELLANT IS NOT ENTITLED TO MAINTENANCE.

Appellant is not entitled to any consideration with respect to his claim for maintenance under the circumstances of this case.

In *Lortie v. American Hawaiian Steamship Co.*, 78 Fed. (2d) 819 (C.C.A. 9th), where a seaman was injured in fighting with another member of the crew, it was said at page 821:

“There can be no question that, if the appellant was injured during a drunken brawl, he can recover neither damages nor maintenance and cure.”

In *Meyer v. Dollar Steamship Line*, 49 Fed. (2d) 1002 (C.C.A. 9th), where a seaman sued for maintenance and cure and wages for an injury suffered while

scuffling with another member of the crew, it was said at page 103:

“However, when he commenced his good-natured scuffling with his fellow shipmate the situation was changed. Appellant by his own volition created an extraneous circumstance; he brought about an intervening cause that directly affected his relations to his employer and to the ship.”

And the Court held that such injuries were not received in service of the ship.

In *Brock v. Standard Oil Company of New Jersey*, 33 Fed. Supp. 353, at 355, where a libelant sustained a broken hand in a fight with another crew member, it was said:

“There remains the action for maintenance and cure. Since the libelant’s injury was due to his own willful misconduct and since there was not negligence on the part of the respondent, there can be no recovery for maintenance and cure by libelant.”

CONCLUSION.

It is respectfully submitted that:

1. The District Court properly dismissed this cause for lack of jurisdiction and this Court should sustain the ruling dismissing the libel for lack of jurisdiction;
2. The cause should not be heard *de novo* by this Court;

3. Appellant is not entitled to a decree on the facts aside from the jurisdictional questions;

4. Appellant is not entitled to War Risk benefits.

Dated, San Francisco,
September 8, 1947.

Respectfully submitted,

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Attorney for Appellee.

JOHN H. BLACK,

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Of Counsel.

11481

No. 11,461

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SUE HOO CHEE,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

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11481
No. 11,461

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SUE HOO CHEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Appeal from a judgment and order made by the United States District Court for the Northern Division of the Northern District of California, sentencing appellant for the felonious concealment of opium in violation of Title 21 USCA Section 174, to a term of two years and a fine of One Thousand Dollars.

THE INDICTMENT.

The indictment charges the defendant Sue Hoo Chee in one count as follows:

That on or about the 17th day of August, 1946, at the City of Marysville, County of Yuba, within said

Northern Division of the Northern District of California, Sue Hoo Chee, whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, did unlawfully, knowingly and fraudulently conceal and facilitate the concealment of a certain derivative and preparation of opium, to-wit, smoking opium, more particularly described as approximately forty-eight (48) grains of smoking opium, which said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

21 USCA Section 174.

APPELLANT'S ASSIGNMENT OF ERROR.

Appellant assigns three errors:

1. The United States Attorney was guilty of prejudicial misconduct in charging that appellant's wife used narcotics.
2. The District Court erred to the prejudice of appellant in permitting the United States Attorney to offer evidence that appellant's wife used narcotics, over the objections of appellant that such evidence was incompetent, irrelevant, immaterial, and prejudicial.
3. The District Court erred to the prejudice of appellant in permitting the United States Attorney to offer evidence that appellant operated a gambling house, over the objections of appellant that such evidence was incompetent, irrelevant, immaterial, and prejudicial.

FACTS OF THE CASE.

On the 17th day of August, 1946, Arnold C. Lachenauer, the federal narcotic agent in company with Dennis McAuliffe, a police officer connected with the City of Marysville Police Department, at approximately 10:30 P. M. on said date were located in Mr. McAuliffe's automobile parked on First Street in the City of Marysville. At this time Mr. Lachenauer and Mr. McAuliffe were keeping under observation the premises of 306 First Street, located a short distance from their car, which premises were known to be occupied by the appellant. After a short period of time, two men who appeared to be Chinese came from the premises at 306 First Street and one of these men walked directly across the street and entered an establishment located there. After some few minutes this same individual, who proved to be the appellant, walked up First Street and past the location of the officers' car which was parked diagonally with the curb. The appellant was seen to walk to the corner of First and Elm Streets and then proceed up the block on Elm Street and out of the view of the officers.

After some few minutes had passed, the appellant then came back to the corner of First and Elm Streets and proceeded a short distance along First Street at which time he was located approximately in front of the officers' car. Mr. McAuliffe then called out "Henry", which was the American name by which appellant was known and by which name he was known to Mr. McAuliffe. At this time the appellant was observed to stoop down, looking toward the officers, and seen to

make a quick motion with his arm as if throwing something. Mr. Lachenauer testified that at this time he saw something white leave the appellant's hand. (Tr. page 41.) The evidence disclosed that appellant at this time was partially obscured from view by a fig tree which was located there between the officers' car and the walk provided for pedestrians. Officer Lachenauer, upon alighting from their automobile, and in the presence of appellant, stated to Officer McAuliffe, "I saw him throw something." (Tr. page 41) and at that time while Officer Lachenauer stood with appellant, Officer McAuliffe went to the spot indicated, some few feet back from the fig tree and there with the aid of his flash light "saw a small bindle that was wrapped in light paper and brought it over to Agent Lachenauer and handed it to him." (Tr. 20, 30.) This bindle proved to contain smoking opium or narcotics, and was marked Government's Exhibit No. 1, subsequently admitted into evidence, and constituted the narcotics the unlawful concealment and possession thereof for which appellant was convicted. This bindle was wrapped in a light colored tissue paper constituting an outer wrapper, which tissue paper proved to be similar in character to that found in the home of the appellant. The evidence disclosed that this paper, which was individual in character and dissimilar to the type of tissue paper familiar to our experience, as appears from the evidence, apparently came from China.

Officers Lachenauer and McAuliffe, in company with the appellant and also in company with Mr. John

Dower, the County Probation Officer and a Marine Lieutenant by the name of Tribble proceeded to the premises at 306 First Street. The appellant then opened the door of his premises at 306 First Street by the use of a key and all parties mentioned then entered the premises. The appellant, although cautioned to the contrary, upon entering his premises hollered out the name "Carmen". (Tr. page 46.)

At that time appellant's wife was in the upstairs portion of the premises and Officer McAuliffe, having been acquainted with her proceeded upstairs to question her. Subsequently, Mrs. Mary Allread, Police Matron for the City of Marysville was summoned in connection with the questioning of appellant's wife and the search of the premises and all officers proceeded to search the property for the purpose of possible discovery of additional narcotics. No presence of narcotics was discovered at the premises and after a period of time had elapsed the officers left the premises, taking appellant to the Police Station. Prior to appellant's leaving his wife he was heard to make the statement to her "Don't tell them anything; tell them nothing." (Tr. page 67.) The foregoing substantially outlines events transpiring from the time appellant's premises were placed under observation by the officers to the time appellant was taken into custody by the arresting officers.

ARGUMENT.

Appellant assigns as error a question directed to the appellant by the Government on cross-examination pertaining to the knowledge on the part of appellant of the use by appellant's wife on the evening of August 17, 1946, of smoking opium. It is contended that the Government was guilty of prejudicial misconduct by deliberately attempting to invoke into the trial prejudicial and immaterial matter concerning the use of narcotics by appellant's wife.

It is respectfully submitted that this question directed to appellant on cross-examination was proper and did pertain to a material issue in so far as relation to the offense with which appellant stood charged. The appellant was charged with the wilful possession and concealment of narcotics, to-wit: opium; and referral to the Reporter's Transcript, page 147, discloses that appellant denied ever having seen opium or ever having seen any substance similar to Government Exhibit No. 1 which was the bundle of smoking opium found near appellant.

It is submitted that the Government, acting in good faith, was therefore entitled to go into the matter on cross-examination directed to the inquiry as to whether or not appellant had not come in actual contact with smoking opium on the same evening in his own home by witnessing or having knowledge that his wife had smoked opium. The good faith in this respect is disclosed by the later attempt on the part of the Government to establish through the testimony of Mr. Lachenauer, the narcotic agent, that appellant's wife had,

in his opinion, been, shortly prior to entry of the residence, smoking opium. This inquiry going to the question of such knowledge or lack of knowledge on the part of appellant was directly connected with the issue in this case and particularly in view, as heretofore stated, of the nature of appellant's testimony to the effect that he had no knowledge of opium or that he had never seen narcotics in such form before. The evidence disclosed that appellant left his residence and presumably the presence of his wife some 10 or 15 minutes prior to the time that he was seen to throw the bindle of opium and consequently in determining the guilt or innocence of appellant so far as his possession of such opium, it is submitted it was competent to prove in this case that appellant's wife had been shortly before such time using smoking opium. Of course, as disclosed by the record (Tr. page 174) the Government was not permitted to establish the fact that in the opinion of Mr. Lachenauer, the Narcotic Agent, appellant's wife, had shortly prior thereto, been using smoking opium. The Court also sustained appellant's objection (Tr. page 151) in the first instance and upon cross-examination of appellant relating to his knowledge of use by appellant's wife of narcotics.

It is therefore submitted that the questions asked by the Government on cross-examination of appellant were proper and material to the principal issue in the case.

“Circumstances attending a particular transaction under investigation by a jury if so inter-

woven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

Vilson v. U. S. (CCA 9), 61 F. (2d) 901.

"The common object of the associated persons forms a part of the *res gestae* and evidence was admissible even though conspiracy was not charged."

Cossack v. U. S. (CCA 9), 82 F. (2d) 214, 216.

In answer to appellant's contention of error assigned under Point No. 2 of Specification of Errors, it is disclosed that appellant's wife on direct examination (Tr. page 160) was asked the direct question as to whether or not she used narcotics. The following questions and answers appear:

"Q. Now do you use narcotics?

A. Absolutely not.

Q. Have you ever used them?

A. No.

Q. Ever had them in your possession?

A. Never had.

Q. In that place or any other place?

A. No place. I never did see any until that night when he brought that up there."

(Tr. p. 160.)

Certainly there could then be no complaint of error on the part of the Government on cross-examination of going into the matter pertaining to the use by appellant's wife of narcotics or smoking opium. If for

no other reason such questions were proper for the purpose of laying a foundation for impeachment of such witness' testimony. It cannot be contended that such questions constituted prejudicial error or were not material to the issue of the guilt or innocence of appellant.

The case of *Ingram v. U. S.*, 9 Cir. 1939, 106 F. (2d) 683, cited by appellant in support of the contention of prejudicial error committed by the Government has no bearing upon the circumstances as presented in instant case. This conclusion is clearly shown by the following language appearing at page 684 of the opinion. That language is as follows:

“* * * However, the questions addressed to her were not a cross of her direct examination. Instead of being cross-examination, they introduced an entirely new field of discussion, not relevant to the direct examination, namely, the private life of Mrs. Ingram. The method used was an inquiry as to the continuity of the wife's living with her husband during years prior to the charged offense and then questioning as to claimed improprieties in her conduct, inconsistent with that of a continued marital relationship. It is obvious that the main purpose of entering into this area, irrelevant to the direct examination, was to degrade her in the minds of the jury. The prejudicial effect of the questions is obvious. Also it is our opinion that had they not been asked the jury well could have believed her explanation of her husband's presence and that of his belongings in Woods' rooms.”

In answer to appellant's specification of error under Point No. 3, that is, questions directed by the Government relating to the fact that appellant operated his premises also as a gambling establishment, there can be no question of the application of the law in such respect. Appellant testified on direct examination (Tr. pages 114-115) that his business was and had been that of operating a soda fountain and ice cream parlor. The representative of the Government certainly committed no error, but to the contrary would have been derelict in his duty if on cross-examination the appellant had not been asked questions pertaining to the fact that appellant also operated his establishment as a gambling business. The law is also well established that where a character witness has testified that a defendant's reputation for truth, honesty and integrity in the community is good, that it is then proper on cross-examination of such character witness to inquire into such witness's knowledge concerning matters such as illegal activities which might bear upon the witness's testimony concerning such general reputation. (Tr. page 75.)

People v. Buchanan (1932), 119 Cal. App. 523,
6 P. (2d) 538;

Stewart v. U. S., 104 F. (2d) 234, 70 App. DC
101;

King v. U. S., 112 F. 998, 50 CCA 647.

It will be noted in this respect, that regardless of the Government's position, which it is contended was absolutely proper, that the Court (Tr. page 76) nevertheless sustained appellant's objection to such question.

The appellant in this instance certainly received greater protection than he was entitled to under the law.

The character witness for appellant, as disclosed by the Record (Tr. page 72), was called to testify out of order and consequently when appellant, on cross-examination (Tr. page 137) admitted the operation of his business as a gambling establishment it became unnecessary to further impeach appellant's testimony on direct examination and impeach appellant's general reputation by the introduction of testimony by way of rebuttal. Consequently, contrary to the contention of appellant, the Government did not offer such evidence but such evidence was introduced by appellant himself on his cross-examination.

It is respectfully submitted that taking into consideration the facts of this case as a whole, no error in the admission of evidence nor prejudicial misconduct on the part of the Government was committed. The Government properly inquired into the matter of appellant's knowledge of smoking opium in his home when appellant, on direct examination, and also on his cross-examination, denied ever having seen opium before. This inquiry was proper by way of impeachment of appellant and was directly connected with the charge against the appellant of unlawful possession of narcotics. The fact that such inquiry related to his knowledge of use of smoking opium in his home on the same date by his wife did not constitute such inquiry as to knowledge inadmissible, immaterial, or result in any prejudicial misconduct on the part of the

Government. As heretofore indicated, the Government wholly in good faith attempted to support its right of impeachment in this respect by offering testimony by the Narcotic Agent, who unquestionably was qualified by years of experience as an expert to establish such fact as to whether an individual had been immediately prior to his observation, using narcotics by smoking of opium. Also, it became material and proper on cross-examination of appellant's wife, to lay a foundation for the purpose of impeaching her testimony concerning her use of narcotics by the smoking of opium, whether or not such proof might injure the appellant, it nevertheless was a proper consideration in determination of appellant's guilt. Use by appellant's wife of smoking opium shortly prior to the apprehension of appellant, where the evidence disclosed appellant had been constantly living with his wife and had left her presence shortly before, did go directly to the determination of appellant's truthfulness in respect to his testimony that he had not had the bundle of smoking opium in his possession and had never seen any smoking opium before. Therefore, the Government's questions on cross-examination of both appellant and his wife were proper questions for the purpose of impeachment concerning matters bearing directly on the issue in the case, i.e., whether appellant unlawfully possessed the narcotics in question on the evening of August 17, 1946, some few minutes after having left the presence of his wife at their home and place of residence. The Government has refrained from a discussion of the question of suf-

iciency of the evidence to support the verdict in this case as appellant has made no contention that there was a lack of evidence to support the verdict. Clearly there can be no question in this respect. The testimony of Mr. Lachenauer and Mr. McAuliffe is unequivocal in support of the conclusion that appellant at the time in question, August 17, 1946, did possess the bindle of opium which he threw to the ground upon being addressed by Mr. McAuliffe. Appellant's own witness, Mr. Broxson, a legal photographer, testified on cross-examination (Tr. pages 105, 106) that under the physical conditions, location of the fig tree with respect to the position of the Government's agents, on the evening in question that such agents would have been able to observe, as they so testified, the physical movements of appellant. The testimony of Mr. McAuliffe is corroborated in every respect, even by the testimony of appellant, except of course, concerning appellant's possession of the narcotics. Appellant himself corroborates all testimony of Mr. Lachenauer and Mr. McAuliffe concerning the entire passing of events up to the point of having made a motion throwing something from his hand. Of course, appellant denies this fact, and denies that he possessed the bindle of smoking opium, the possession of which he was found to be guilty by the verdict of the jury.

Certainly, even if it were to be assumed that any error entered into the trial of the instant case an examination of the entire cause, including the evidence, clearly discloses that the verdict cannot, under any consideration, be deemed a miscarriage of justice.

CONCLUSION.

It is respectfully submitted that judgment should be affirmed.

Dated, Sacramento, California,
May 12, 1947.

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11431
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IN THE
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For the Ninth Circuit

SUE HOO CHEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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IN THE

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For the Ninth Circuit

SUE HOO CHEE,

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VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

By the time this brief is reached it will be evident to the court that the insinuations that appellant's white wife was a narcotic user first came into the record at the instance of the United States Attorney during his cross-examination of appellant. The court eventually curbed the insinuating line of interrogation by ruling that it was improper cross-examination. But in resisting that ruling the United States Attorney found occasion to state in the presence of the jury that he had evidence in his possession that appellant's wife was a narcotic user and that appellant had knowledge of her use.

The result of these improper insinuations was to force appellant's counsel to one or the other of two

alternatives when he called appellant's wife to the stand as a witness for appellant. She appeared before the jury as one branded by a United States Attorney as a narcotic user upon proof asserted to be in his possession. If she was not interrogated on direct examination respecting the insinuations, the jury would naturally assume that she could not deny them. If she was interrogated on direct examination respecting the insinuations, the United States Attorney would naturally attempt to pursue a line of further insinuations on cross-examination. What the United States Attorney fails to recognize in the brief for appellee is that it was because of his improper conduct that appellant's counsel was forced to these alternatives.

The course taken by appellant's counsel was to interrogate the witness on the subject during her direct examination. On direct examination she emphatically denied that she was a narcotic user. On cross-examination she emphatically repeated those denials. The false issue thus created was a collateral one, and under the authorities cited in appellant's previous brief was not subject to rebuttal testimony. Contrary to the rule of such cases, however, the United States Attorney persisted in his improper insinuations by offering rebuttal testimony until he was eventually and belatedly curbed by adverse rulings of the court.

That appellant was denied a fair trial would seem obvious. By the insinuations just discussed it was conveyed to the jury that his white wife was a narcotic user with his consent and approval and that the

United States Attorney had evidence in his possession to prove the truth thereof. By other insinuations discussed in appellant's previous brief it was conveyed to the jury that appellant conducted a gambling house. No case of a person of the Chinese race charged with illicitly trafficking in narcotics could possibly survive in surroundings of improper insinuations so damaging and prejudicial.

The language of the Supreme Court of the State of California in *People v. Glass*, 158 Cal. 650, is particularly apt.

Quoting from pages 654, 655, 656, 657, and 658:

(654) "It should seem unnecessary to state—but apparently" (655) "it is not—that a multitude of acts, facts, and happenings upon which men base their opinions and judgments of their fellow-men do not come within the definition and scope of *evidence* as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that 'it was to be expected.' Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons

good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced within the charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps, undue tenderness goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors, if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury."

(656) "The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretenses. It was designed to besmirch and degrade the defendant and to be made use of in argument, to show that the defendant had gone the length of organizing" (657) "a fraudulent corporation. * * *

That this evidence was potent for the purpose of degrading the defendant in the eyes of the jurors will at once be conceded. That it had a tendency to inflame the mind of the jurors against the defendant by showing that in the past he had resorted to the arts of treachery and fraud to prevent honest competition, is quite apparent. That men in the every day affairs of life would have been influenced by" (658) "such evidence is unquestionably true. But these things go to establish merely the wrong which its admission worked upon the defendant, and not its admissibility. It was not admissible. Clearly, in the everyday affairs of life, if it should be established to the satisfaction of the jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with them in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case, where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the court of appeals of New York says: 'The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. * * * Yet the inference drawn by the prosecuting officer, and permitted by the court, left it to the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of the bribe in the other; hence that

*Was this page misplaced
in binding? Look
as if it were.*

No. 11585

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,
Appellant,
vs.

GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,
Appellees.

Transcript of Record
In Two Volumes
Volume I
Pages 1 to 288

**Upon Appeal from the District Court for the Territory of
Alaska, Fourth Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

HENRY J. RICHARDSON, Esq.,
WALTER C. FOX, JR., Esq.

For Commissioner:

LLOYD C. HOOKS, Esq.

Transferred to Judge Harlan. 7/22/36.

Docket No. 453 P. T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

Aug. 10—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 10—Copy of petition served on General Counsel.

Aug. 10—Request for hearing at San Francisco, filed by taxpayer. 8/20/45 Granted.

Sep. 21—Motion for extension to 11/8/45 to move or to file answer, filed by General Counsel. 9/21/45 Granted.

Nov. 7—Motion to dismiss appeal filed by General Counsel.

1945

- Nov. 9—Hearing set 11/28/45 on respondent's motion.
- Nov. 28—Hearing had before Judge Turner on motion of respondent to dismiss. Consolidated with Docket 452 P. T. Held C.A.V. Respondent's brief due 90-days. Petitioner's reply brief 30-days. Respondent's reply brief 20-days.
- Dec. 3—Transcript of hearing 11/28/45 filed.

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- Feb. 26—Brief re motion to dismiss filed by General Counsel. Served 2/27/46. Copies Received 5/8/46.
- Mar. 28—Reply brief re motion to dismiss filed by taxpayer. Served 3/29/46.
- Apr. 17—Reply to petitioner's brief filed by General Counsel. Served 4/18/46. Copies received 5/8/46.
- Jul. 31—Memorandum opinion rendered, Judge Harlan. Motion to dismiss proceeding will be sustained. Copy served 8/1/46.
- Aug. 6—Decision entered. Judge Harlan. Div. 11.
- Aug. 22—Motion for review by the Court, memorandum in support attached, filed by petitioner. 8/23/46 Denied.
- Aug. 27—Motion for reconsideration filed by taxpayer. 8/28/46 Denied.
- Oct. 23—Petition for review by U. S. Circuit Court of Appeals and statement of points filed by taxpayer.

1946

Oct. 23—Proof of service filed by taxpayer.

Oct. 23—Praecipe with proof of service thereon
filed by taxpayer. [1*]

The Tax Court of the United States

Docket No. 453 P. T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Comes now California and Hawaiian Sugar Refining Corporation, Ltd., claimant, and files its petition with The Tax Court of the United States, requesting a hearing on the merits of its claim filed under Title VII of the Revenue Act of 1936 for the refund of processing tax paid under the Agricultural Adjustment Act, as amended, which was disallowed in whole by the Commissioner of Internal Revenue by letter dated May 19, 1945, bearing symbols IT:P:CA:DHS, and as a basis of this proceeding alleges as follows:

I.

Petitioner is a corporation organized and existing under and by virtue of the laws of the State

* Page numbering appearing at top of page of original certified Transcript of Record.

of California, with its principal address at 215 Market Street, San Francisco, California. Petitioner filed its processing tax returns with and paid the tax thereon to the United States Collector of Internal Revenue at San Francisco, California, for the period of the tax herein involved. [2]

II.

Petitioner filed its claim under Title VII of the Revenue Act of 1936 as amended for refund of the tax paid under the Agricultural Adjustment Act as amended, with respect to the processing of jute fabric on P.T. Form 79, Treasury Department, Internal Revenue Service, for the amount of \$4,-818.00 with the Collector of Internal Revenue at San Francisco, California, on December 27, 1939. A copy of said claim as amended is attached hereto and made a part hereof as Exhibit A. On December 16, 1942, within three years after the said claim was filed, the period within which the Commissioner was required to allow or disallow said claim was extended with the written consent of the claimant to June 30, 1943; on May 14, 1943, said period was extended to June 30, 1944, and on May 24, 1944 said period was so extended to June 30, 1945.

III.

The notice of disallowance of petitioner's claim for refund (a copy of which is attached hereto as Exhibit "B") was mailed to petitioner by respondent by registered mail on May 19, 1945.

IV.

The respondent's disallowance of petitioner's claim for refund in whole is based upon the following errors:

(1) Respondent erred in holding that

“An examination of the evidence submitted in connection with and in support of your claim discloses that you have not established that you bore the burden of the tax, refund of which is claimed. [3] Accordingly, your claim is hereby disallowed in the full amount.” (Notice of Disallowance.)

(2) Respondent erred in failing to hold that petitioner had established in accordance with the statute and regulations that petitioner bore the burden of all of the tax according to the evidence and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, and that no understanding or agreement exists whereby petitioner may be relieved of the burden, reimbursed therefor, or may shift such burden.

(3) Respondent erred by, in effect, adopting as rebuttal of petitioner's evidence that it bore the burden of the entire tax the position that because of its manner of operating as a Cooperative petitioner could not as a matter of law bear any part of the burden of the tax or of any other expense of operation.

(4) In so holding respondent erred in construing Title VII of the Revenue Act of 1936 in a manner

to constitute a denial of due process of law in contravention of Section 1 of the 5th Amendment to the Constitution of the United States.

(5) In so holding and construing said Title VII as applied to petitioner's organization and method of doing business, but allowing the claims of other processors who bore the burden of the tax in the same manner, respondent has erred by discriminating against petitioner contrary to law.

(6) In so holding respondent has erred in ignoring the mandate of the law that producer owned and controlled cooperative marketing associations shall be recognized and encouraged [4] rather than penalized because of their method of operations.

V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner's principal business is that of refining and selling sugar, maintaining a complete line of sugar products of all grades and types of packages. As an incident to said principal business petitioner manufactures some of the containers in which said sugar products are sold, including bags made of jute fabric. As such manufacturer of jute bags petitioner was a first domestic processor of the jute fabric so used.

(2) In November 1933 the Secretary of Agriculture ordered that the processing tax then being imposed under the Agriculture Adjustment Act on cotton should apply to the first domestic processing

of jute as compensating tax on a kindred commodity effective on all processing after December 1, 1933.

(3) During the period of the tax, to-wit, through the months of December 1933 to and including November 1935, petitioner processed or used in making jute bags 215,867 pounds of jute fabric and paid the processing tax thereon in the amount of \$4,953.95 with interest of \$30.68. Of this amount petitioner received in May 1935 a refund of the tax amounting to \$166.63, leaving a balance unrefunded of \$4,818.00, the amount of the [5] claim here involved.

(4) The Agricultural Adjustment Act was held to be unconstitutional, and the taxes collected thereunder illegally collected, by the United State Supreme court in *U. S. v. Butler, et al.* (297 U. S. 1) on January 6, 1936.

(5) Congress enacted Title VII of the Revenue Act of 1936, approved June 22, 1936, prohibiting the refund of any tax, paid as processing tax, to the processor from whom it had been so illegally collected except in accordance with provisions of said Title.

(6) Petitioner complied with the provisions of said Title VII and timely filed its claim for refund of the tax paid by it as aforesaid on the ground that it did not sell any articles processed from the commodity and never changed the price of its product for which the jute bags were used as containers to take into account the processing tax on the processing of said jute, and submitted with said claim evidence to prove said grounds.

(7) No part of the processing tax with respect to which the aforesaid claim was filed, has at any time been refunded to petitioner.

(8) Petitioner bore the burden of the amount of the tax paid by it as processor to the extent of \$4,818.00 and has not been relieved thereof nor reimbursed therefor, nor shifted such burden directly or indirectly through the inclusion of such amount in the price of sugar sold; through reduction of the price paid for the commodity processed; or in any other manner whatsoever; and no understanding or agreement exists whereby petitioner may be relieved of the burden of such amount, be reimbursed therefor, or [6] may shift the burden thereof.

(9) Petitioner is a corporation created under the General Corporation Laws of the State of California.

(10) Throughout the periods here involved petitioned was organized and operated on a cooperative basis, marketing the product of its members, who were also its stockholders in approximately the same relative proportions as they produced the product for marketing, and turning back to them according to the quantity and quality of such products furnished by them gross proceeds of sales of the product furnished and all other income less necessary marketing expenses, a nominal fixed dividend on its capital stock and reasonable reserves for necessary purposes.

(11) Under the contract forming the cooperative

basis petitioner purchased the raw sugar produced by its stockholders, who thus became its cooperative members, at a unit price determined on a yearly basis by adding the gross proceeds from the sale of such sugar, the gross proceeds from the sale of sugar purchased from others and all other income of petitioner for such year, subtracting therefrom the purchase price of sugar purchased from others all manufacturing, marketing, operating and other expense of petitioner for the year involved, including reasonable reserves for necessary purposes, and an amount equal to 6% of petitioner's capital with which to pay a nominal fixed dividend on its capital stock, and dividing the remainder by total units purchased from its member-stockholders during such year.

(12) Under said contract petitioner paid this purchase price by remitting to its member for their respective sugar [7] as an initial payment 75% of an agreed average market basis within a certain number of days after delivery or shipment, plus or minus polarization premium or penalty for sugar testing above or below 96° raw value for the sugar purchased from them, and after the end of a given year's operations and the determination of the unit purchase price as aforesaid for said year, adding there to polarization penalties deducted and subtracting polarization premiums added in the initial payments, and deducting the initial payment previously made (exclusive of polarization premiums or

penalties) to a member, paid said member the balance of the unit price so determined.

(13) Petitioner in marketing the product supplied by its member-stockholders under the contract aforesaid processed some of the products and sold the remainder of the product supplied by them to other refiners in its raw state or without processing.

(14) During petitioner's fiscal year ended November 30, 1934, its member-stockholders supplied it with 824,413 tons of sugar 96° raw value, of which petitioner received for refining or processing 495,535 tons and sold the remainder of 328,878 tons in its raw state or without processing to other refiners, and during its fiscal year ended November 30, 1935, its member-stockholders supplied it with 838,957 tons of sugar 96° raw value, of which petitioner received for refining or processing 536,610 tons and sold the remainder of 302,347 tons in its raw state or without processing to other refiners. Petitioner also purchased and processed 9,582 tons of sugar 96° raw value from non-members during its fiscal year 1934 and 9,060 tons during its fiscal [8] year 1935. Of 489,725 tons 96° raw value refined or processed by petitioner during its fiscal year ended November 30, 1934, 236,926 tons were so refined or processed during the period of tax, and the processing tax paid thereon by petitioner, and the remainder of 252,799 tons was refined by petitioner before the period of the tax. Of 583,236 tons refined or processed by petitioner during its fiscal year ended November 30, 1935, 547,628 tons were so

refined or processed during the period of the tax, and the processing tax paid thereon by petitioner, and the remainder of 35,608 tons was refined by petitioner after the period of the tax.

(15) Under petitioner's cooperative method of operating, with its member-stockholders pursuant to the contract aforesaid, the entire avails or net results of petitioner's entire operations, determined in the manner aforesaid, whether from the sale of their product or not, were returned to said member-stockholders as members of a Cooperative, according to the quantity and quality of the product supplied by each such member in proportion to the total quantity and quality of such product supplied by all such members during each of the fiscal years ended November 30, 1934 and 1935. Thus each such member received from petitioner from the avails of its operations during its fiscal years ended November 30, 1934 and 1935, the exact same amount per unit of product supplied by it to petitioner as did each other member during the same year, adjusted only for polarization premiums and penalties. Thus each member received from petitioner the same amount per unit [9] of product supplied by it regardless of whether the product supplied by it was refined or processed by petitioner or sold in its raw state to other refiners, or whether said product was processed by petitioner during the period of the tax or outside of such period. Thus the economic effects of the tax or other expense or of any income of petitioner were felt, not by the producers of the

sugar processed during the tax period, but by all the cooperative members of petitioner without distinction as between those who supplied raw sugar which was processed and those who supplied sugar which sold raw without processing, and without distinction as between those whose raw sugar was processed during the tax period and those whose sugar was processed outside the tax period. In this same manner the common stockholders of any other corporation or the members of any partnership would have felt such economic effects.

(16) Petitioner purchased the jute fabric, with respect to the processing of which the tax here involved was imposed and paid, in the open market at current prices from persons unknown to petitioner.

(17) Petitioner did not sell any of the jute bags constituting the article processed from the commodity, and therefore has no gross sales value of such articles, or such gross sales value was zero, for purposes of computing any margin evidence according to the statute. [10]

(18) Petitioner never at any time changed the differential in price between packages of its product sold in jute bags and that sold in other types of containers with respect to the manufacturing of which no tax was imposed, on account of the processing tax on jute.

Wherefore, petitioner prays that this Court will grant a hearing on the merits of its claim and find

that it bore the burden of the tax according to the evidence in the amount of \$4,818.00, and order a refund thereof with interest as provided by law.

/s/ HENRY J. RICHARDSON,
Transportation Building,
Washington 6, D. C.

/s/ WALTER C. FOX, JR.,
111 Sutter Street,
San Francisco 4, California.

VERIFICATION

State of California,
City and County of San Francisco—ss.

C. E. Schink, being duly sworn, says that he is Treasurer of the petitioner, California and Hawaiian Sugar Refining Corporation, Ltd., and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those stated to be upon information and belief, and those facts he believes to be true.

C. E. SCHINK.

Subscribed and sworn to before me this 1st day of August, 1945.

[Seal] ELLA COOK KELLY,
Notary Public, in and for the City of San Francisco, State of California.

My Commission expires Dec. 23, 1948.

Filed Aug. 10, 1945. [12]



SCHEDULE A.—PROCESSING TAX PAYMENTS BY CLAIMANT TO COLLECTOR OF INTERNAL REVENUE

FOR COLLECTION OF CERTIFICATE

Amount

Receipt

Page

1

Item No.	Month for which tax was paid (a)	Amount of processing tax (b)	Amount of each tax payment (c)	Penalty (d)	Interest (e)	Date of each payment (f)	Disposit in which paid (g)	Amount (h)	Date (i)	Page (j)
1	1 Dec.	200.00	200.00	-	.30	1/20/24	2,7.			
2	1 Jan.	200.00	200.00	-	.30	2/21/24	-			
3	2 Feb.	200.00	200.00	-	.30	3/20/24	-			
4	3 Mar.	200.00	200.00	-	.30	4/10/24	-			
5	4 Apr.	200.00	200.00	-	.30	5/24/24	-			
6	5 May	200.00	200.00	-	.30	6/23/24	-			
7	6 June	200.00	200.00	-	.30	7/20/24	-			
8	7 July	200.00	200.00	-	.30	8/22/24	-			
9	8 Aug.	200.00	200.00	-	.30	9/20/24	-			
10	9 Sep.	200.00	200.00	-	.30	10/20/24	-			
11	10 Oct.	200.00	200.00	-	.30	11/20/24	-			
12	11 Nov.	200.00	200.00	-	.30	12/20/24	-			
13	12 Dec.	200.00	200.00	-	.30	1/20/25	-			
14	1 Jan.	200.00	200.00	-	.30	2/20/25	-			
15	2 Feb.	200.00	200.00	-	.30	3/20/25	-			
16	3 Mar.	201.00	201.00	-	.30	4/20/25	-			
17	4 Apr.	200.00	200.00	-	.30	5/20/25	-			
18	5 May	200.00	200.00	-	.30	6/20/25	-			
19	6 June	200.00	200.00	-	.30	7/20/25	-			
20	7 July	200.00	200.00	-	.30	8/20/25	-			
21	8 Aug.	200.00	200.00	-	.30	9/20/25	-			
22	9 Sep.	200.00	200.00	-	.30	10/20/25	-			
23	10 Oct.	200.00	200.00	-	.30	11/20/25	-			
24	11 Nov.	200.00	200.00	-	.30	12/20/25	-			
25	12 Dec.	200.00	200.00	-	.30	1/20/26	-			
26	1 Jan.	200.00	200.00	-	.30	2/20/26	-			
27	2 Feb.	200.00	200.00	-	.30	3/20/26	-			
28	3 Mar.	200.00	200.00	-	.30	4/20/26	-			
29	4 Apr.	200.00	200.00	-	.30	5/20/26	-			
30	5 May	200.00	200.00	-	.30	6/20/26	-			
31	6 June	200.00	200.00	-	.30	7/20/26	-			
32	7 July	200.00	200.00	-	.30	8/20/26	-			
33	8 Aug.	200.00	200.00	-	.30	9/20/26	-			
34	9 Sep.	200.00	200.00	-	.30	10/20/26	-			
35	10 Oct.	200.00	200.00	-	.30	11/20/26	-			
36	11 Nov.	200.00	200.00	-	.30	12/20/26	-			
37	12 Dec.	200.00	200.00	-	.30	1/20/27	-			
38	1 Jan.	200.00	200.00	-	.30	2/20/27	-			
39	2 Feb.	200.00	200.00	-	.30	3/20/27	-			
40	3 Mar.	200.00	200.00	-	.30	4/20/27	-			
41	4 Apr.	200.00	200.00	-	.30	5/20/27	-			
42	5 May	200.00	200.00	-	.30	6/20/27	-			
43	6 June	200.00	200.00	-	.30	7/20/27	-			
44	7 July	200.00	200.00	-	.30	8/20/27	-			
45	8 Aug.	200.00	200.00	-	.30	9/20/27	-			
46	9 Sep.	200.00	200.00	-	.30	10/20/27	-			
47	10 Oct.	200.00	200.00	-	.30	11/20/27	-			
48	11 Nov.	200.00	200.00	-	.30	12/20/27	-			
49	12 Dec.	200.00	200.00	-	.30	1/20/28	-			
50	1 Jan.	200.00	200.00	-	.30	2/20/28	-			
51	2 Feb.	200.00	200.00	-	.30	3/20/28	-			
52	3 Mar.	200.00	200.00	-	.30	4/20/28	-			
53	4 Apr.	200.00	200.00	-	.30	5/20/28	-			
54	5 May	200.00	200.00	-	.30	6/20/28	-			
55	6 June	200.00	200.00	-	.30	7/20/28	-			
56	7 July	200.00	200.00	-	.30	8/20/28	-			
57	8 Aug.	200.00	200.00	-	.30	9/20/28	-			
58	9 Sep.	200.00	200.00	-	.30	10/20/28	-			
59	10 Oct.	200.00	200.00	-	.30	11/20/28	-			
60	11 Nov.	200.00	200.00	-	.30	12/20/28	-			
61	12 Dec.	200.00	200.00	-	.30	1/20/29	-			
62	1 Jan.	200.00	200.00	-	.30	2/20/29	-			
63	2 Feb.	200.00	200.00	-	.30	3/20/29	-			
64	3 Mar.	200.00	200.00	-	.30	4/20/29	-			
65	4 Apr.	200.00	200.00	-	.30	5/20/29	-			
66	5 May	200.00	200.00	-	.30	6/20/29	-			
67	6 June	200.00	200.00	-	.30	7/20/29	-			
68	7 July	200.00	200.00	-	.30	8/20/29	-			
69	8 Aug.	200.00	200.00	-	.30	9/20/29	-			
70	9 Sep.	200.00	200.00	-	.30	10/20/29	-			
71	10 Oct.	200.00	200.00	-	.30	11/20/29	-			
72	11 Nov.	200.00	200.00	-	.30	12/20/29	-			
73	12 Dec.	200.00	200.00	-	.30	1/20/30	-			
74	1 Jan.	200.00	200.00	-	.30	2/20/30	-			
75	2 Feb.	200.00	200.00	-	.30	3/20/30	-			
76	3 Mar.	200.00	200.00	-	.30	4/20/30	-			
77	4 Apr.	200.00	200.00	-	.30	5/20/30	-			
78	5 May	200.00	200.00	-	.30	6/20/30	-			
79	6 June	200.00	200.00	-	.30	7/20/30	-			
80	7 July	200.00	200.00	-	.30	8/20/30	-			
81	8 Aug.	200.00	200.00	-	.30	9/20/30	-			
82	9 Sep.	200.00	200.00	-	.30	10/20/30	-			
83	10 Oct.	200.00	200.00	-	.30	11/20/30	-			
84	11 Nov.	200.00	200.00	-	.30	12/20/30	-			
85	12 Dec.	200.00	200.00	-	.30	1/20/31	-			
86	1 Jan.	200.00	200.00	-	.30	2/20/31	-			
87	2 Feb.	200.00	200.00	-	.30	3/20/31	-			
88	3 Mar.	200.00	200.00	-	.30	4/20/31	-			
89	4 Apr.	200.00	200.00	-	.30	5/20/31	-			
90	5 May	200.00	200.00	-	.30	6/20/31	-			
91	6 June	200.00	200.00	-	.30	7/20/31	-			
92	7 July	200.00	200.00	-	.30	8/20/31	-			
93	8 Aug.	200.00	200.00	-	.30	9/20/31	-			
94	9 Sep.	200.00	200.00	-	.30	10/20/31	-			
95	10 Oct.	200.00	200.00	-	.30	11/20/31	-			
96	11 Nov.	200.00	200.00	-	.30	12/20/31	-			
97	12 Dec.	200.00	200.00	-	.30	1/20/32	-			
98	1 Jan.	200.00	200.00	-	.30	2/20/32	-			
99	2 Feb.	200.00	200.00	-	.30	3/20/32	-			
100	3 Mar.	200.00	200.00	-	.30	4/20/32	-			
101	4 Apr.	200.00	200.00	-	.30	5/20/32	-			
102	5 May	200.00	200.00	-	.30	6/20/32	-			
103	6 June	200.00	200.00	-	.30	7/20/32	-			
104	7 July	200.00	200.00	-	.30	8/20/32	-			
105	8 Aug.	200.00	200.00	-	.30	9/20/32	-			
106	9 Sep.	200.00	200.00	-	.30	10/20/32	-			
107	10 Oct.	200.00	200.00	-	.30	11/20/32	-			
108	11 Nov.	200.00	200.00	-	.30	12/20/32	-			
109	12 Dec.	200.00	200.00	-	.30	1/20/33	-			
110	1 Jan.	200.00	200.00	-	.30	2/20/33	-			
111	2 Feb.	200.00	200.00	-	.30	3/20/33	-			
112	3 Mar.	200.00	200.00	-	.30	4/20/33	-			
113	4 Apr.	200.00	200.00	-	.30	5/20/33	-			
114	5 May	200.00	200.00	-	.30	6/20/33	-			
115	6 June	200.00	200.00	-	.30	7/20/33	-			
116	7 July	200.00	200.00	-	.30	8/20/33	-			
117	8 Aug.	200.00	200.00	-	.30	9/20/33	-			
118	9 Sep.	200.00	200.00	-	.30	10/20/33	-			
119	10 Oct.	200.00	200.00	-	.30	11/20/33	-			
120	11 Nov.	200.00	200.00	-	.30	12/20/33	-			
121	12 Dec.	200.00	200.00	-	.30	1/20/34	-			
122	1 Jan.	200.00	200.00	-	.30	2/20/34	-			
123	2 Feb.	200.00	200.00	-	.30	3/20/34	-			
124	3 Mar.	200.00	200.00	-	.30	4/20/34	-			
125	4 Apr.	200.00	200.00	-	.30	5/20/34	-			
126	5 May	200.00	200.00	-	.30	6/20/34	-			
127	6 June	200.00	200.00	-	.30	7/20/34	-			
128	7 July	200.00	200.00	-	.30	8/20/34	-			
129	8 Aug.	200.00	200.00	-	.30	9/20/34	-			
130	9 Sep.	200.00	200.00	-	.30	10/20/34	-			
131	10 Oct.	200.00	200.00	-	.30	11/20/34	-			
132	11 Nov.	200.00	200.00	-	.30	12/20/34	-			
133	12 Dec.	200.00	200.00	-	.30	1/20/35	-			
134	1 Jan.	200.00	200.00	-	.30	2/20/35	-			
135	2 Feb.	200.00	200.00	-	.30	3/20/35	-			
136	3 Mar.	200.00	200.00	-	.30	4/20/35	-			
137	4 Apr.	200.00	200.00	-	.30	5/20/35	-			
138	5 May	200.00	200.00	-	.30	6/20/35	-			
139	6 June	200.00	200.00	-	.30	7/20/35	-			
140	7 July	200.00	200.00	-	.30	8/20/35	-			
141	8 Aug.	200.00	200.00	-	.30					

9. "EDULE B.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

Flow payment against which this was made, by reference to Schedule A	CREDIT				REFUND		Total credits and refunds	Per cent of Bureau
	YEAR OF P. T. RETURN			Amount	Date received	Amount		
	Form No.	Month	Year					
4	8	May	1935	136.30				
5	8	May	1935	44.56				
6	8	May	1935	17.79				
7	8	May	1935	<u>94.28</u>				
				194.93				

SCHEDULE C.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCEEDING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

[illegible]

30. DUTY D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN

(a) AVERAGE MARGIN FOR THE TAX PERIOD

Claimant must show as to each month of the tax period the data required in columns 2 to 7, inclusive. Such data shall be shown only with respect to the commodity or commodities for which the claimant paid processing tax to the collector of Internal Revenue. See also para. 7 (b) (1) and 9 (c) also 7 (b) (4) of instructions on this form.

(1) Months for which the period is shown (beginning and ending date)	(2) Gross sales value of all articles sold during the month	(3) Cost of the commodity processed during the month	(4) Amount of tax ¹ paid during the month	(5) Total of columns 2 and 3	(6) Margin (Amount in column 2 less amount in column 5)	(7) Total number of months during which commodity was processed	(8) For use of Bureau
Jan							
Feb							
Mar							
Apr							
May							
Jun							
Jul							
Aug							
Sep							
Oct							
Nov							
Dec							
TOTALS							

The average margin¹ for the tax period per (unit of the commodity) was \$

¹ The average margin for the tax period shall be ascertained by dividing the total of the margins for the period (total of column 6) by the total number of units of the commodity processed during the period (total of column 7).

² The term "unit of commodity" is defined in par 9 (f) of instructions.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(b) AVERAGE MARGIN FOR THE PERIOD BEFORE AND AFTER THE TAX

(Claimant must show as to each month of the period before and after the tax the data required in columns 2 to 5, inclusive. See also para. 2 (b) (5) and 9 (c) also 7 (b) (4) of instructions on this form.)

(1) Month (or, if appropriate, sub-periods and year)	(2) Gross sales value of all articles produced from commodity	(3) Cost of commodity produced during month	(4) Margin (Amount in column 2 less amount in column 3)	(5) Total number of units of the commodity produced during month	(6) Per unit of Bureau
1938					
January					
February					
March					
April					
May					
June					
July					
Totals					

The average margin ¹ for the period before and after the tax per

(Unit of commodity) ² was \$

¹ The average margin for the period before and after the tax shall be ascertained by dividing the total of the margins for the period (total of column 4) by the total number of units of the commodity produced during the period (total of column 5).

² The term "unit of commodity" is defined in par. 9 (j) of instructions.

(15)

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Continued

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(c) CALCULATION OF AMOUNT AS INDICATED BY THE EVIDENCE AS TO MARGINS

(1) Average margin per unit of commodity processed for the period (As shown by Schedule D-1 (b))	(2) Average margin per unit of commodity processed for the tax period (As shown by Schedule D-1 (c))	(3) Amount of tax borne by claimant for the period (Column 1 minus column 2)	(4) Total number of units of commodity processed during tax period with respect to which processing tax is shown by Schedule D-1 (a)	(5) Amount of tax borne by claimant for the period (Column 3 multiplied by column 4)
\$ <u>None</u> per (Unit of commodity)	\$ <u>None</u> per (Unit of commodity)	\$ per (Unit of commodity)	(Unit of commodity)	\$

- A. The amount shown in column 5 above, namely, \$....., is the correct amount of the processing tax paid by claimant and not shifted to others. (If claimant agrees that this figure is correct any additional facts and evidence in support thereof should be set out and made a part of Schedule D-2.)
- B. The amount shown in column 5 above is not the correct amount of the processing tax paid by claimant and not shifted to others. The correct amount is \$ 4,818.00 for the reasons and upon the evidence set out and made a part of Schedule D-2.

D-2. OTHER EVIDENCE

(Claimant must complete either A or B below and strike out the one not applicable.)

(Claimant shall list below each document, exhibit, statement of facts, and other evidence submitted with and made a part of this schedule in support of the showing as to margins, or in rebuttal thereof and tending to establish that he bore the burden of the tax. See also pars. 7 (a) and 7 (c) of instructions.)

SCHEDULE 1 - Statement of Amount of Tax Borne by Claimant.

SCHEDULE 1a - Statement of Price Differentials for Period October 24, 1933 to February 5, 1934.

SCHEDULE 1

Jute Fabric

Amount of Processing Tax Paid on Jute

Fabric (Schedule A)\$4,953.95

Amount of Interest Paid on Above Taxes .. 30.68

Total Payments (Schedule A)\$4,984.63

Amount of Credits Taken by Claimant

(Schedule B) 166.63

Balance of Payments\$4,818.00

Amount of Tax Shifted to Vendees or Other

Persons by Increases in Selling Prices of

Sugar Products None

Burden of Processing Tax Borne by

Claimant\$4,818.00

Supporting Statement

The business of this claimant is the manufacture and sale of sugar products. The claimant is not in the business of selling jute fabric or articles manufactured therefrom. All articles made from jute fabric upon which processing tax payments were made by claimant were used as containers for the packing of sugar.

Schedule A shows the amount of tax upon the monthly production of articles made from jute fabric. On June 11, 1934, the tax was suspended on small jute bags. As a result, refund or credit of some processing tax was obtained on articles in

inventory as of that date. These articles are eliminated from this claim. The cost of jute fabric used for container material is one of claimant's costs for preparing sugar products for sale. The tax imposed upon jute articles likewise became an additional cost of this claimant. Since claimant is not merchandising jute fabric, there is no sales value and no margin of sales value over cost. These costs could have shifted only to purchasers of the sugar products. Claimant did not pass on the burden of the tax by any increase in the package differential or in the price of refined sugar or in any other way.

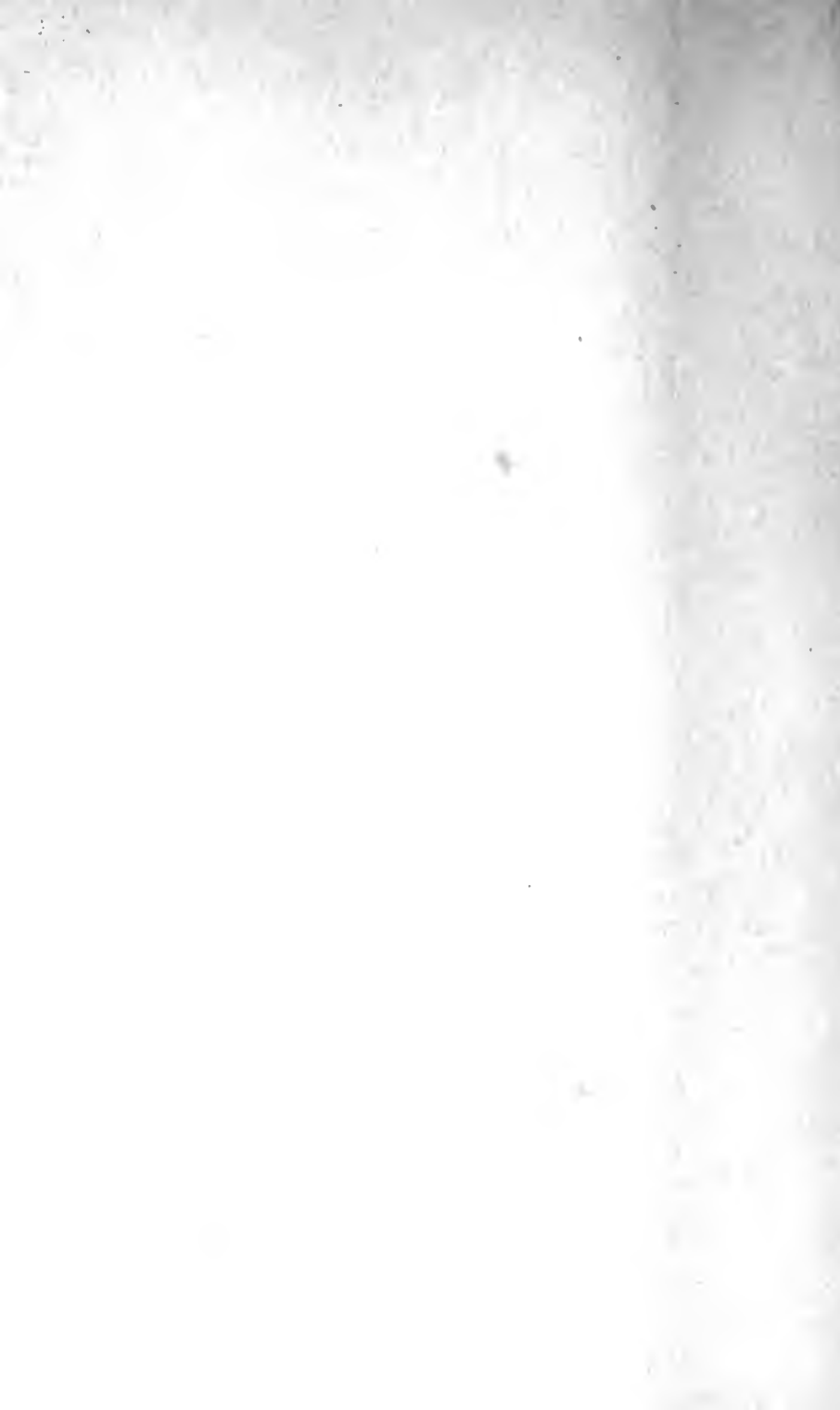
As to Package Differentials: Sugar is sold at a "Basis Price", to which are added differential charges for certain grades of sugar and certain styles of packages. In Schedule 1-a the package differentials for these containers on which processing tax was paid, are shown for the period October 24, 1933, to February 5, 1936. During this period all of the articles upon which processing tax refund is now claimed were used in manufacture. This Schedule 1-a demonstrates that no increases were employed during this entire period as a means of passing to the purchasers of the sugar products the tax burden of processing tax paid on jute fabric.

As to Passing on the Tax by Increasing the Basis Price of Sugar: The amount of the processing tax on jute fabric, in terms of cost per 100 pounds of sugar output, was as follows:

Articles	Weight Per Unit (Pounds)	Rate of Tax (Dollars)	Amount of Tax Per Unit (Dollars)	Amount of Tax per 100 lbs. Sugar (Dollars)
Period 12/1/33 to 6/12/34:				
Jute Bags—100# Size.....	.81250	.02914	.023676	.023676
Jute Bags— 50# Size.....	.468561	.02914	.013654	.027308
Jute Bags— 25# Size.....	.28012	.02914	.008163	.032652
Period 6/12/34 to 11/30/36:				
Jute Bags— 50# Size.....	.46856	.0211	.0098866	.0197732
Jute Bags— 25# Size.....	.28012	.0211	.0059105	.0236420

These small unit costs on certain items did not warrant, even if competitive factors had permitted, an advance in the price of sugar, as the basis price for sugar is customarily changed by 10 cents or more per hundred weight. The basis price for sugar, furthermore, is established competitively and applies to all sugar products.

Claimant, therefore, maintains that the processing tax on jute fabric covered by this claim represented a cost which it bore the full burden of and which it did not pass on to other persons directly or indirectly. [21]



	10 <u>6/3/34</u>	11 & 12 <u>6/25/34</u>	13 <u>10/2/34</u>	14 <u>11/3/34</u>	15a16a17 <u>11/23/34</u>
<u>SMALL</u>					
25# Bag	.15	.15	.15	.15	.15
25# Bag	.20	.20	.15	.15	.15
25# Bag	.15	.15	.15	.15	.15
50# Bag	.15	.15	.15	.15	.15
	.15	.15	.15	.15	.15
<u>LARGE</u>	.15	.15	.15	.15	.15
100# Bag	None	None	None	None	None
	"	"	"	"	"
	3 & 9 <u>2/29/35</u>	10 <u>7/20/35</u>	11 <u>9/20/35</u>	12 <u>9/24/35</u>	1 <u>2/3/36</u>
<u>SMALL J</u>					
25# Bags	.15	.15	.15	.15	.15
25# Bags	.15	.15	.15	.15	.15
25# Bags	.15	.15	.15	.15	.15
50# Bags	.15	.15	.15	.15	.15
	.15	.15	.15	.15	.15
<u>LARGE J</u>	.15	.15	.15	.15	.15
100# Bags	None	None	None	None	None
	"	"	"	"	"



PACKAGE PRICE DIFFERENTIALS FOR BAGS MADE FROM JUTE FABRIC

October 24, 1935 to February 3, 1936

Price Card Number.		13	14 & 15	16	17 & 18	1 & 2	3 & 4	5 & 6	7 & 8	9	10	11 & 12	13	14	15a, 16a, 17
Effective Date....		10/24/35	11/3/35	12/18/35	12/18/35	2/3/36	4/18/36	5/9/36	5/24/36	9/3/36	9/25/36	10/2/36	10/2/36	11/3/36	11/26/36
<u>SMALL JUTE BAGS</u>															
25# Bags Powdered	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.20	.20	.20	.20	.20	.20	.20	.20	.20	.20	.20	.15	.15	.15
25# Bags Softs	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
50# Bags	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15

LARGE JUTE BAGS

100# Bags	Coast	None	None	None	None	None	None	None	None	None	None	None	None	None	None
	East	"	"	"	"	"	"	"	"	"	"	"	"	"	"
Price Card Number.		13	1	2	3	4	5	6	7	8 & 9	10	11	12	1	
Effective Date....		12/3/34	1/3/35	1/7/35	2/7/35	2/18/35	3/25/35	3/29/35	4/13/35	4/29/35	7/20/35	9/20/35	9/24/35	2/3/36	

SMALL JUTE BAGS

25# Bags Powdered	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
25# Bags Softs	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
50# Bags	Coast	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15

LARGE JUTE BAGS

100# Bags	Coast	None	None	None	None	None	None	None	None	None	None	None	None	None	None
	East	"	"	"	"	"	"	"	"	"	"	"	"	"	"



Notes on Exceptions to Prevailing Differential
Prices Shown on Schedule 1-a

50# Bags

Effective January 24, 1934, the 50# Berry differential was eliminated in Southern California and Arizona. The differential remained on all other 50# bags.

Effective May 15, 1934, 50# Berry differential was reduced in Portland territory from 15c to 10c over basis. On May 28, the entire Northwest was reduced from 15c over to 10c over basis.

Effective May 22, 1934, 50# Berry differential was reduced from basis to 10c below basis in Southern California and Arizona (One day only). This was withdrawn May 23, 1934.

Effective September 12, 1934, to meet competition, the 50# Berry differential was reduced in Southern California and Arizona from basis to 10c below basis. The reduction was withdrawn November 26, 1934.

Effective February 6, 1935, at certain points in our Denver territory a 20c allowance was made for 50# Berry.

Effective November 27, 1935, 50# Berry differential was made uniform on the Pacific Coast at 15c.

25# Bags Powdered

Effective September 12, 1934, 25# bags powdered differential was reduced in Southern California from 15c over basis to 5c over basis. This was withdrawn November 26, 1934.

Effective October 1, 1934, 25# bag powdered differential was reduced in our Eastern territories from 20c over basis to 15c over basis. This decrease was to meet competition.

Effective December 11, 1934, the 15c differential on 25# powdered in Arkansas, Illinois, Wisconsin, and upper peninsula of Michigan and Eastern non-guarantee territory was increased to 20c.

Effective December 21, 1934, 25# powdered differential in the Eastern Fringe was reduced from 20c to 15c.

Effective January 7, 1935, in Eastern Non-Guarantee territory 25# powdered differential was increased from 20c to 35c.

Effective June 10, 1935, 25# powdered differentials were reduced from 35c to 15c in the non-guarantee territory.

Effective June 14, 1935, in part of Wisconsin, the 25# powdered differential was reduced from 35c to 15c. [23]

EXHIBIT "B"

Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to

IT:P:CA

DHS

May 19, 1945

California and Hawaiian Sugar
Refining Corporation, Ltd.,
215 Market Street,
San Francisco, California.

In re: Claim No. F-9161
Amount: \$4,818.00

Gentlemen:

Reference is made to the above-numbered claim for refund of an amount paid as tax under the provisions of the Agricultural Adjustment Act on the processing of cotton.

Section 902 of the Revenue Act of 1936 provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner that he bore the burden of such amount and has not been relieved there-

of, nor reimbursed therefor, nor shifted such burden directly or indirectly, as set forth in that section.

An examination of the evidence submitted in connection with and in support of your claim discloses that you have not established that you bore the burden of the tax, refund of which is claimed. Accordingly, your claim is hereby disallowed in the full amount.

The disallowance of your claim will become final unless within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you file a petition with The Tax Court of the United States for a hearing on the merits of the claim.

A copy of this letter has been mailed to your representatives, Messrs. Henry J. Richardson and John Lewis Kelly, Washington, D.C., and Mr. Walter C. Fox, Jr., San Francisco, California, in accordance with the authority contained in powers of attorney on file in this office.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ NORMAN D. CANN,
Deputy Commissioner. [24]

The Tax Court of the United States

Docket No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

MOTION TO DISMISS

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that the above-entitled proceeding be dismissed, and, as grounds for this motion, respectfully shows as follows:

(1) The petition, together with the exhibits attached thereto and made a part thereof, fails to set forth facts sufficient to constitute a cause of action for refund of any part of any amount paid by the petitioner as processing tax under the Agricultural Adjustment Act, as amended, on the first domestic processing of jute.

(2) The petition, together with the exhibits attached thereto and made a part thereof, shows on its face that the petitioner did not bear the burden of any part of the amount paid by it as processing tax under the Agricultural Adjustment Act, as amended, on the first domestic processing of jute.

(3) The petition, together with the exhibits attached thereto and made a part thereof, fails to

allege or show that the financial benefits or considerations realized by the petitioner under its contracts with its "member-stockholders" were in anywise adversely affected or decreased because of the payment by the petitioner of certain amounts as processing tax.

Wherefore, it is prayed that this motion be granted. It is further prayed that if this motion be not granted, the respondent be allowed the usual time after the entry of the decision on this motion within which to move further or answer the allegations contained in the petition.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Of Counsel:

RAYMOND F. BROWN,
IRENE F. SCOTT,
LLOYD C. HOOKS,

Special Attorneys, Bureau of Internal Revenue.

Received and filed Nov. 7, 1945. [26]

The Tax Court of the United States

Docket Nos. 452 and 453, P.T.

THE CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

H. J. Richardson, Esq., and Walter C. Fox, Jr.,
for the petitioner.

Lloyd C. Hooks, Esq., for the respondent.

MEMORANDUM OPINION

Harlan, Judge: Respondent filed identical motions to dismiss these proceedings because the respective petitions and their attached exhibits:

(1) Failed to set forth a cause of action for refund of any part of the processing tax;

(2) Show that the petitioner bore none of the burden of the tax; and

(3) Failed to show that the petitioner's contractual rights or benefits with its stockholder-members were adversely affected by the payment of the tax.

The motions in these two cases were consolidated for hearing and decision. There is no difference in the legal principles involved in the two cases. The factual difference is that in Docket No. 452 the

processing tax was imposed on raw sugar, [27] almost all of which was procured by petitioner from its own stockholder-producers and in Docket No. 453 the processing tax was imposed upon the petitioner for manufacturing jute sacks out of jute cloth, the sacks being used as containers for sugar and the jute cloth being purchased on the open market. In both cases the actual processing tax on the books of petitioner was paid and the amount paid thereon recovered by petitioner in exactly the same way from its stock-holder-producers.

The essential facts disclosed by the petitions and their exhibits upon which respondent relies to support his motions are:

The petitioner is a private business corporation, incorporated under the laws of California, and is engaged in the refining of raw sugar and the marketing of refined and raw sugar.

The equitable title to its capital stock is in thirty separate corporate producer plantations located in Hawaii, the legal title thereto being in six trustees. These same producer plantations are also represented by six corporate factors or agents with offices in San Francisco and Hawaii. The method of business operation between petitioner and the producer plantations during the periods involved are set forth in detail in the contracts attached to the petitions as exhibits. In these contracts the petitioner refers to itself as the "buyer" and the factors representing the plantation producers are referred to as "sellers". This contract provides for the pur-

chase by the petitioner of practically all the raw sugar produced by the plantations. Petitioner agreed to pay for said raw sugar 75 per cent of the market value thereof, depending upon its quality shortly after its delivery in California. Thereafter petitioner, out of its general operating funds, paid the entire expense of marketing said raw sugar or of [28] processing and marketing same, depending upon conditions. Petitioner also paid all taxes, governmental charges, insurance premiums, attorney fees, trustees' fees, etc., and at the end of each fiscal year on November 30th petitioner accounts to the producers for the amount received by it from the sale of sugar and from "all other income", less the charges above mentioned and also less an amount as compensation to the buyer for its services. The provision covering this compensation reads as follows:

* * * as full compensation for the Buyer's services under this agreement, a sum equal to 6% on the capital net worth of the Buyer as shown on its books as of the preceding November 30th.

The final payment from the petitioner to its producer-plantations is to be made on or before December 15th of each year. The amount retained by petitioner as compensation for its services, over and above its expenses, constitutes the fund from which dividends are paid on the capital stock of petitioner. However, there is no limitation set forth in the petitions or the exhibits requiring the corporation to distribute any part of this "compensation" to its stockholders.

There is no contention by the petitioner that the contracts attached to the petitions represent any unusual method of operations applied only during the processing tax years; also there is no averment that during the taxing years the amount retained by petitioner was either more or less than the six per cent provided in the contract.

Petitioner argues that the relationship between this corporation and its co-operative producers is similar to the relationship between a partnership and its partners, between a trustee and his beneficiaries or a corporation and its stockholders. It contends that the passing of the burden of the processing tax back to the co-operative producer in this case is identical to the transferring [29] of such a burden from a partnership to its members, from a trustee to his beneficiaries or from a corporation to its stockholders, and that if petitioner is not permitted to recover in this case, logically no one but an individual processor should ever recover.

Unfortunately for petitioner's position section 902 of the Revenue Act of 1936 as amended does not, by its terms, prohibit a corporation, trustee, or partnership processor from recovering processing taxes because the tax was indirectly paid by the stockholders, beneficiaries or partners, respectively. It does, however, specifically interdict the repayment of the processing tax to processors who have shifted the processing tax burden "through reduction of the price paid for any such commodity." There is no contention in this case but that peti-

tioner, before it paid for its raw sugar supplies to the producers thereof, deducted the amount of the processing tax from the price which it paid therefor.

Petitioner has both stockholders and co-operative producers. The fact that the equitable owners of the stock and the producers are the same corporate individuals does not obliterate the important fact that these corporate individuals as producers occupy a different relationship a petitioner than that occupied in their capacity as stockholders. The processing taxes involved have been shifted by petitioner to its stockholder-producers in their capacity as producers and not in their capacity as stockholders. The burden was assumed by the producers, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the taxable commodity furnished (in the case of raw sugar), or used (in the case of jute bags); but in proportion to the raw sugar sold by the producer to the petitioner regardless of what amount of that raw sugar was ever actually processed or actually sold in bags or in bulk. [30]

Petitioner contends that since the producer and processor are so closely associated in a co-operative corporation:

We think that Sec. 902 (a) requires a consolidation of a processor with its owners and persons owned by it as an economic unit for purposes of determining whether any part of the unit as a whole shifted any tax to a vendee

or reduced the price paid for the commodity by any tax or shifted the tax in any other manner.

Congress has never been remiss about casting its favors on co-operatives and we feel that if it had really desired to confer this additional privilege on them, while prohibiting the shifting of the processing tax from processors to producers, in all other forms of industrial units, it would have plainly said so. For this Court to so declare would constitute, in our opinion, judicial legislation.

If the petitioner had paid its processing tax by reducing its dividends on its capital stock, or by some other method by which the producer-stockholders had borne the burden as stockholders and not as producers, it might be that petitioner could justify its claim, but the case before us is not such a case. Petitioner's decision to distribute the burden of these processing taxes back to its producers, in our opinion, precludes it from recovering its processing taxes just as certainly as did the same method in the case of *Savannah Sugar Refining Corporation vs. Commissioner*, 121 Fed. (2d) 426, where the court said:

In construing the Act it has been repeatedly held that suits for the recovery of processing taxes may be maintained against the Government only under such conditions and with such limitations as Congress has prescribed. Therefore, only the person who has actually paid the tax may file a claim for refund and he can not recover if he has been reimbursed in any way

and had not borne the burden of the tax. No right of recovery is given a person not initially paying the tax although he may have borne the burden. Manifestly, it would be impracticable to do so as a person paying the tax may have passed it on to hundreds of others and so many claims might be filed they could not be handled.

The motion to dismiss these proceedings will be sustained.

Entered July 31, 1946.

[Seal] [31]

The Tax Court of the United States

Docket No. 453 P.T.

THE CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, entered July 31, 1946, it is

Ordered: That this proceeding is dismissed.

It Is Further Ordered: That there is no refund due the petitioner with respect to his claim for re-

fund of processing taxes in the amount of \$4,818.00.

[Seal] /s/ BYRON B. HARLAN,
 Judge.

Entered August 6, 1946. [32]

The Tax Court of the United States

Docket Nos. 452, 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Honorable The Presiding Judge of

The Tax Court of the United States:

MOTION FOR REVIEW BY THE COURT

Comes now the petitioner above named, by its attorney, Henry J. Richardson, and moves the Presiding Judge to direct a review by the whole Court of the Division decision sustaining respondent's motions to dismiss the above-entitled and docketed cases, contained in the memorandum opinion entered on July 31, 1946, as provided in Section 1118 (b) of the Internal Revenue Code or in Section 906 (e) of the Revenue Act of 1936, and, if said review is directed, that the orders entered in said cases on August 6, 1946, be vacated pending decision by the whole Court.

As grounds in support of this motion petitioner submits that: [34]

A. The cases involve very important questions of law in statutory interpretation which have never before been directly decided by this or any other court.

B. These cases involve very substantial amounts, in fact, based upon the facts alleged in the petitions which are taken as admitted for purposes of these motions, the amount involved exceeds \$2,650,000.

C. The Memorandum Opinion of the Division demonstrates a complete lack of understanding of the significance of the facts of the cases and positive errors in interpreting the applicable terms of the statute in that—

(1) It fails wholly to take into account the law governing the operation of Cooperatives organized under the laws of the State of California;

(2) It fails to recognize the difference in the “price paid” in every day commercial transactions, which is the sense in which that term is used in Section 902 (a), and the “total payment” for the product under the cooperative method of operation, which is the vehicle for distributing the profits or proceeds from the cooperative operation under the contract in these cases.

(3) It fails to recognize the difference between “reduction of the price paid” for the

commodity processed on which the tax was imposed and paid, and the indirect reduction of distributable profits as a part of the "total payment" due all members on all the products furnished by them—more than 50 per cent of which was not subject to the tax at all.

(4) The memorandum opinion while basing its conclusion on the improper inference that the tax was shifted "through reduction of the price paid for such commodity" is totally and undeniably in error in applying the same reasoning to the Jute case, Docket No. 453, where the jute fabric, with respect to the processing of which the tax was imposed, was not acquired from petitioner's members but in the open market. Certainly [35] no "price paid" was reduced by any tax in such an acquisition.

(5) The memorandum opinion contains such expressions as to the facts of the cases as to show a conception thereof contrary to the facts alleged in the petitions and the evidence which would be admissible in proof thereof.

(6) The memorandum opinion fails to consider at all the provisions of Section 907 of the Revenue Act of 1936 which was enacted by Congress as a means of meeting the requirements of Section 902 thereof.

D. The existing confusion with respect to what decisions of this Court may be reviewed on appeal

to the Circuit Court of Appeals places a great responsibility on this Court.

These grounds will be discussed in the memorandum attached hereto.

Wherefore, it is prayed that this motion may be granted and respondent's motions to dismiss denied.

Respectfully submitted,

/s/ HENRY J. RICHARDSON,
Transportation Bldg.,
Washington 6, D.C.

/s/ WALTER C. FOX, JR.,
111 Sutter Street,
San Francisco, California,
Attorneys for Petitioner.

Filed Aug. 22, 1946.

Denied Aug. 23, 1946. T.C.U.S.

/s/ J. E. MURDOCK,
Presiding Judge. [36]

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner above named, by its attorney Henry J. Richardson, and moves the Court for a reconsideration of the opinion sustaining respondent's motions to dismiss the above-entitled and docketed cases entered on July 31, 1946.

As grounds to support this motion petitioner states that the entire basis of the opinion is erroneous, in that

1. It misconstrues the statutory term "price paid" to mean petitioner's "total payment" for all the commodity produced by all of its members, whereas the statutory clause "price paid for such commodity" clearly means the "price paid" for the commodity on which the tax was imposed;

2. It totally misconceives the significance of the fact that the tax paid by petitioner was equally spread over or entered into the determination of the amount of its "total payment" based on all the products of its members, only about 47 per cent of which was subject to the tax, and that in no [37] event was the "price paid" for jute (Docket No. 453) reduced in any manner whatsoever.

3. It misapplies the only authority cited, namely, *Savannah Sugar Refining Corp. v. Commissioner*, 121 Fed. (2d) 426, by considering that the "same method" was employed by petitioner as in that case, whereas in that case Savannah charged the entire tax to the specific sugar on the processing of which the tax was paid, under a specific contract made for that purpose, and in the case at bar the tax was not and could not be so charged, but on the contrary under both the contract of cooperation and the California Agricultural Code the tax, like any other expense, had to be spread equally, based on the total product of petitioner's members. Furthermore, *Savannah Sugar Refining Corporation in P.T.*

Docket No. 299, recovered a substantial refund of other processing taxes paid on sugar which did not reduce the "price paid" for the commodity (sugar) on which the tax was imposed. If petitioner had charged the total tax against the product of its members which was processed and on which the tax was paid, the Savannah case might be applicable, but this was not and could not be done. And at most only 47 per cent of the tax could be said to be charged so as to reduce the "price paid" for the commodity on which the tax was imposed. On the other hand, the other Savannah case (P.T. Docket No. 299) is authority for refunding that part of the tax which was not so charged even if the processor did charge some of the tax against a part of the product. [38]

4. It fails totally to take into account the law of cooperative associations under the California Agricultural Code in refusing to recognize the parallel between the legal capacity of a member producer thereof and persons entitled to the profits or proceeds of operations of other legal types of processors;

5. It ignores entirely the provisions of Sec. 907 of Title VII, Revenue Act of 1936, which were enacted to augment the provisions of Sec. 902 and make possible the determination of the exact question in this case, and concerning which this Court in a memorandum opinion in *Realty Operators, Inc. v. Commissioner*, Docket No. 423, P.T., said:

“Section 907 deals with prima facie evidence and presumptions which shall be available in determining the questions of ultimate fact posed by Section 902.”

To save repetition there is attached hereto a copy of the printed memorandum brief submitted in support of petitioner's motion for review, in which substantially the aforesaid grounds are discussed.

Wherefore, it is prayed that this motion may be granted, and respondent's motions to dismiss the petitions herein denied.

Respectfully submitted,

/s/ HENRY J. RICHARDSON,

Attorney for Petitioner.

Filed Aug. 27, 1946.

Denied Aug. 28, 1946, U.S.T.C.

/s/ BYRON B. HARLAN,
Judge. [39]

In the United States Circuit Court of Appeals
for the Ninth Circuit

In The Tax Court of the United States
No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,
Petitioner,

vs.

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue,
Respondent.

PETITION FOR REVIEW AND STATEMENT
OF POINTS TO BE RELIED UPON

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now California and Hawaiian Sugar Re-
fining Corporation, Ltd., the above-named peti-
tioner, by its attorney Henry J. Richardson, and
respectfully shows:

I.

Venue:

California and Hawaiian Sugar Refining Corpo-
ration, Ltd., the petitioner on review (herein re-
ferred to as petitioner) is a corporation organized
and existing under and by virtue of the laws of the
State of California with its principal office and
place of business at 215 Market Street, San Fran-
cisco, California; and Joseph D. Nunan, Jr., the
respondent on review (herein referred to as re-
spondent) is the duly qualified and acting Commis-

sioner of [40] Internal Revenue, appointed and holding office by virtue of the laws of the United States;

Petitioner filed its returns of the tax with respect to which this proceeding arises and made all payments thereof to the United States Collector of Internal Revenue at San Francisco, California, which place is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit;

The Court in which the review of the proceeding is sought is the United States Circuit Court of Appeals for the Ninth Circuit, which Court has jurisdiction to review the decision of The Tax Court of the United States in the instant proceeding by virtue of Section 510(j) of the Revenue Act of 1942 (56 Stat. 969), amending Section 906(g) of the Revenue Act of 1936 (49 Stat. 1750);

The final decision of The Tax Court of the United States dismissing this proceeding was entered on August 6, 1946.

II.

Nature of Controversy:

This is a proceeding under Title VII of the Revenue Act of 1936 (49 Stat. 1648, 1747) to recover \$4,818.00 paid by petitioner as the processing tax on jute under the Agricultural Adjustment Act of 1933, the taxing provisions of which were declared unconstitutional in *U. S. v. Butler* (297 U. S. 1).

Title VII requires in Section 902 that a claimant in order to obtain a refund must establish that he bore the burden of the amount claimed. [41]

Both in its claim, which the respondent denied in its entirety, and in its petition to The Tax Court requesting a hearing on the merits of its claim, petitioner alleged that it had borne the burden of the amount claimed, as required by Section 902, and showed by other allegations the complete details of the manner in which said burden was borne and the amount thereof.

The petition contains detailed allegations to the effect that throughout the period here involved petitioner operated as a non-profit cooperative marketing association under the laws of the State of California, returning to its members (all sugar producers) annually the entire net proceeds from its operations on the basis of the product supplied by them.

Respondent did not file an answer to the petition but instead filed a motion to dismiss the proceeding, which of course admits the allegations of the petition.

Upon this motion The Tax Court on August 6, 1946, entered its decision dismissing the proceeding based on a memorandum opinion by Harlan, Judge, sustaining the motion.

The memorandum opinion covered not only this case but also the sugar processing tax case of this petitioner, said cases being consolidated before The Tax Court.

The memorandum opinion as applied to this case serves to point out the real basis and fundamental

error of the decision of The Tax Court in holding that a processor which operated as a non-profit cooperative marketing association is barred from making any recovery of a refund under Title VII.

The Tax Court's attempt at rationalization of its conclusion by saying that petitioner shifted the processing tax burden "through reduction of the price paid for any such commodity" is in spite of and directly contrary to the facts of this case, because petitioner acquired the jute in the open market from persons unknown to it, and not from its members who were entitled to share the proceeds of petitioner's operations on the basis of the products supplied by them.

III.

Petitioner, being aggrieved by the decision of The Tax Court of the United States and the conclusions of law and fact contained in the opinion on which said decision is based, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review said decision, and files herewith the following statement of the points upon which it intends to rely:

1. The decision of The Tax Court is not in accordance with law;

2. The point of fact upon which the memorandum opinion purportedly rests, namely, that petitioner "shifted the processing tax burden through reduction of the price paid for any such commodity" is wholly absent from the case, the jute cloth having been acquired in the open market and not from petitioner's members as was the sugar;

3. The processing tax which petitioner paid on manufacturing jute cloth into bags, like any other expense of operation, operated to reduce the net proceeds from such operations; [43]

4. Petitioner's members as producers, sharing as they do the net proceeds of petitioner's entire operations, including profits, based on the proportion of the product supplied by each, occupy a position with respect to profits from petitioner's operations which are reduced by any and all burdens borne by petitioner, similar to that of a common stockholders of an ordinary corporation, a general partner of a partnership, and the income beneficiary of a trust, with respect to the profits of their respective types of organization, the profits of all of which are obviously reduced by any burdens borne by such organizations;

5. Congress did not intend by Title VII to prohibit recovery in such cases, but was concerned lest the processor or the persons entitled to its profits would be unjustly enriched by the windfall of recovering any tax which the processor or such persons had shifted to others;

6. Neither petitioner nor its members as producers will be unjustly enriched if a refund based on the prima facie evidence and permissible rebuttal is made in this case, but will only be placed in a position of equality with other processors and the persons entitled to the profits from their operation;

7. While holding that these other types of business organizations may recover a refund under Title

VII, as many of them have, The Tax Court refused to recognize the parallel between them and petitioner, and by misconstruction of the terms of the statute jumped to the erroneous conclusion that petitioner shifted the [44] burden of the tax "through reduction of the price paid for such commodity" contrary to the facts alleged in the petition.

Wherefore, petitioner prays that the decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that The Tax Court of the United States be required to certify and file in this Court a transcript of the record in accordance with the law and with the rules of this Court, and that appropriate action be taken to the end that the erroneous decision hereby complained of may be reviewed and corrected by this Court.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,

By /s/ HENRY J. RICHARDSON,

Its Attorney.

Filed Oct. 23, 1946. [45]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To Joseph D. Nunan, Jr., Commissioner of Internal
Revenue, Washington, D. C.
Care of J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent,
Washington, D. C.

You are hereby notified that on the 23rd day of October, 1946, California and Hawaiian Sugar Refining Corporation, Ltd., filed with the Clerk of The Tax Court of the United States a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review and statement of the points relied upon as filed is hereto attached and served upon you this 23rd day of October, 1946.

/s/ HENRY J. RICHARDSON,
Attorney for Petitioner.

Service of the above and foregoing notice, together with a copy of the petition for review and statement of points relied upon is hereby acknowledged this 23rd day of October, 1946.

/s/ J. P. WENCHEL, R. F. B.,
Attorney for Respondent.

Filed Oct. 23, 1946. [46]

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified, as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the United States Circuit Court of Appeals for the Ninth Circuit heretofore filed by petitioner:

1. The docket entries in the proceeding before The Tax Court of the United States;

2. Pleadings:

(a) The petition, together with all exhibits, Exhibit A being a photostatic copy of the claim for refund with accompanying schedules and amendments thereto, and Exhibit B being a photostatic copy of the notice of disallowance of said claim by the Commissioner of Internal Revenue; [47]

(b) The respondent's motion to dismiss the proceeding;

3. Memorandum Opinion of The Tax Court of the United States entered on July 31, 1946;

4. Decision of The Tax Court of the United States entered on August 6, 1946;

5. Petitioner's motion for review by the Court filed on August 22, 1946;

6. Petitioner's motion for reconsideration filed August 27, 1946;

7. Petition for review and statement of points relied on filed October 23, 1946, by petitioner in the above-entitled cause together with notice and proof of service thereof;

8. This Praecipe.

/s/ HENRY J. RICHARDSON,
Attorney for Petitioner.

Service of a copy of the above and foregoing Praecipe to the Clerk of The Tax Court of the United States on petition for review in the above-entitled cause is hereby acknowledged this 23rd day of October, 1946.

/s/ J. P. WENCHEL, R. F. B.,
Attorney for Respondent.

Filed Oct. 23, 1946. [48]

The Tax Court of the United States

Docket No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the fore-

going pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of November, 1946.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 11489. United States Circuit Court of Appeals for the Ninth Circuit. California and Hawaiian Sugar Refining Corporation, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon petition to review a decision of The Tax Court of the United States.

Filed November 25, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

—
Nos. 11488-11489.
—

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION,
LTD., a corporation, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

—
SUPPLEMENTAL BRIEF FOR PETITIONER.
—

FILED

AUG - 9 1947

PAUL P. O'BRIEN,
CLERK

HENRY J. RICHARDSON,
Transportation Building,
Washington 6, D. C.

WALTER C. FOX, JR.,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

Nos. 11488-11489.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION,
LTD., a corporation, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Pursuant to Order of the Court herein filed with the Clerk on July 21, 1947, petitioner respectfully submits as its brief on the questions therein stated, the following:

After observing that "Nowhere in the petitions is it alleged that the evidence supplied the Commissioner is under oath. The copies of the claims attached to the petitions show they were not verified," the Court asks:

Question 1. *Does the record in this respect require us to hold that the Commissioner's disallowance of the claims must be upheld?*

Answer: No. Please see stipulation of counsel for the parties signed on July 23, 1947 and mailed to the Clerk on July 24, 1947 for filing, as follows:

"It is hereby stipulated by and between counsel for the respective parties in the above entitled cases that

the original claims filed on the prescribed forms, unsigned copies of which appear in the Record in No. 11488 at pages 17 to 98, inclusive, and in the Record in No. 11489 at pages 13 to 26, inclusive, were subscribed and sworn to by C. E. Schink, Treasurer under the name of California and Hawaiian Sugar Refining Corporation, Ltd., in accordance with regulations prescribed by the Commissioner with the approval of the Secretary."

By way of apology and explanation counsel for petitioner states that the photostatic copies of the claims for refund attached to the petitions in the Tax Court were made from retained carbon copies of the claims as prepared for filing which through oversight were not conformed with the original of the claims after being signed and sworn to.

It is believed that proof of such filing under oath in the form of the claims for refund that were filed, and which are in the Commissioner's possession, would be admissible under the allegations of the petitions at Par. V (4) of the petition in No. 11488 (R. 7) and in Par. V (6) of the petition in No. 11489 (R. 7) if answers had been filed by the respondents denying such allegations.

The allegations are that "Petitioner complied with the provisions of Title VII and timely filed its claim for refund of the tax paid by it as aforesaid" etc. and, of course, said allegations must be considered as admitted for purposes of the motions to dismiss the petitions herein.

With respect to the remaining questions which are prefaced by the Court's reference to the duty of counsel and their failure to cite or consider the case of *Bogardus v. Santa Ana Walnut Growers Association*, 41 C. A. (2d) 939, counsel for petitioner is very happy for this opportunity to give his views. By way of explanation it is stated that counsel for the petitioner was familiar with the decision in the *Bogardus* case but it was not then recognized that the holding thereof was responsive to or depositive of any ground mentioned by the Tax Court in support of its deci-

sion, nor to the grounds relied on in the brief for the respondent in this Court. In another connection, namely that dealing with the pattern of the margin computations prescribed in Sec. 907 petitioner's brief before the Tax Court contains the following with reference to the relationship between a cooperative and its members.

“With respect to the relationship between a cooperative and its members one writer (L. S. Hulbert, *Legal Phases of Cooperative Associations*, published as Bulletin 50—May 1942, Farm Credit Administration, U. S. Department of Agriculture) has this to say:

‘It is apparent that the relationship between the members and the association is much more intimate and personal than that between an ordinary corporation and its stockholders. The courts have recognized that this is true. (citing *California Canning Peach Growers v. Downey*, 76 Cal. App. 1, 243, p. 679.) It has been said (citing *Rhodes v. Little Falls Dairy Company, Inc.*, 230 App. Div. 571, 245 N. Y. S. 432, 434, 435, affirmed in 256 N. Y. 559, 177 N. E. 140):

“Even though title may have passed, still the arrangement is for cooperative marketing. The status of the parties partakes of a trust or fiduciary character, and is not the simple relation of vendor and vendee; the fund derived from the marketing of the product being subject to distribution among the various producers, sales of whose product had gone to make it up.

* * * * *

“There was a fiduciary relationship here: defendant was dealing with plaintiff's property. It was its duty to get the best price possible for it, to make such deduction from the proceeds for expenses and other items mentioned in the contract as were required in necessity and reason, and to return to plaintiff his share of the profits remaining, if such there were, based upon the milk that he furnished. * * *

‘In a nonlegal sense a cooperative partakes of the nature of a joint enterprise or partnership. Membership in a capital-stock cooperative association is had through the purchase of a share or shares of its stock and the meeting by the purchaser of any other authorized requirements of the association; membership in a nonstock cooperative association is had through application for membership and acceptance by the association and the meeting of any other authorized requirements. A common requirement for both stock and nonstock associations is the signing of a marketing contract.

‘It should not be assumed that the members or stockholders of a cooperative association, except in a technical legal sense, are separate and apart from the association. * * * ’

While the question now posed by this Court as to the definitive legal category of the relationship is not disposed of in the foregoing description, the fiduciary character of the relationship was at least there pointed out. In the Tax Court’s opinion no mention of this relationship is made in any connection.

Some analysis of the *Bogardus* case and the cases cited therein as a preface to their application in answer to the questions propounded by this Court seems appropriate.

In the *Bogardus* case the action was for an injunction and declaratory judgment by some of the members of the cooperative association which was about to pay shares of a revolving fund derived from the sale of products, to persons who were no longer members but who had supplied products while they were members, out of which the revolving fund was created. The decision is based upon an interpretation of the by-laws of the cooperative association. In arriving at the decision the Court there stated that the relationship between the member and the association “was that of principal and agent, or beneficiary and trustee; that a fiduciary relationship existed which required at all times that these associations account to the grower member for all proceeds received from the sale of walnuts * * * .”

It will be noted that the terms "principal and agent, or beneficiary and trustee" are used interchangeably or without distinction as constituting a "fiduciary relationship." It will be seen from the citations *infra* that both an agent and a trustee are fiduciaries in their respective capacities.

In the cited case of *Texas Certified Cottonseed Planters Association v. Aldridge* (122 Texas 464 61 SW 2d 79) the court specifically held that the marketing contract was a contract of purchase and sale and not of agency.

In the cited case of *Rhodes v. Little Falls Dairy Company, Inc.* (230 App. Div. 571) the action was one in equity for an accounting under a purchase and sale contract by which the producer was to receive a share of the profits from the distribution of his product. Little Falls Dairy Company, Inc. does not appear to have been a cooperative association but Rhodes' contract with it created a fiduciary relation between them calling for an accounting in equity.

In *San Joaquin Valley Poultry Association v. Commissioner*, 136 F. (2d) 382 (C. C. A. 9) this court cited the *Bogardus* case for the following statement (L. C. 385):

"The sums so placed in these reserves—the \$1,683.56, the \$2,215.29, the \$5,722.72, the \$2,601.90 and the \$5,358.46—never became the property of petitioner, but were and are the property of the members. *Bogardus v. Santa Ana Walnut Growers Ass'n*, 41 Cal. App. 2d 939, 946-949, 108 P. 2d 52, 56-58. See, also, *Mountain View Walnut Growers Ass'n v. California Walnut Growers Ass'n*, 19 Cal. App. 2d 227, 65 P. 2d 80; *Reinert v. California Almond Growers Exchange*, 9 Cal. 2d 181, 70 P. 2d 190. To hold otherwise would be to hold that petitioner could and did 'make a profit for itself, as such,' in contravention of its by-laws, its articles of incorporation and the statute to which it owes its existence. *Bogardus v. Santa Anna Walnut Grower Ass'n*, *supra*.

"Petitioner never pretended to be the owner of these sums, but, as required by its by-laws, 'prorated' and credited them to its members. The fact that the sums were not payable to the members on demand, or at any fixed time, does not alter the fact that they were

their property and not petitioner's. Petitioner held them, not as owner, but *as agent or trustee* for the members. *Bogardus v. Santa Ana Walnut Growers Ass'n*, supra. Since none of the sums ever belonged to petitioner, they could not be, and were not, income of petitioner." (Emphasis supplied)

Here again the words "agent" or "trustee" appear to be used interchangeably. With deference to this Court it may well be doubted whether the word "agent" is equally applicable with the word "trustee" to describe the capacity of the cooperative in that case. Bearing in mind that the matter dealt with in that case was money or property held in reserves which had been taken out of the proceeds of the cooperative operation which had become profits and which were, under California law, the profits of the members, and that undoubtedly legal title to, and administrative control over, the property constituting the reserves was in the cooperative association, it would seem that the proper description of the capacity of the cooperative association was that of "trustee" rather than that of "agent." Reference in this case to the reserves as being "property of the members" might also be appropriately qualified as property belonging beneficially to them since legal title thereto and control over said property was definitely in the cooperative association.

In the book "Legal Phases of Cooperative Associations" by L. S. Hulbert, published by the Farm Credit Association, U. S. Department of Agriculture, as Bulletin 50, May 1942, which is referred to and quoted from in the above excerpt from petitioner's brief before the Tax Court, the *Bogardus* case is cited in connection with five different statements. At page 5 it is cited in support of the above quoted statement from brief before the Tax Court. At page 74 it is cited in connection with the following statement and quotation from an Oregon case, *River Orchard Company v. Stone*, 97 Oreg. 158, 191 Pac. 662. The facts of that case are almost exactly on all fours with those in the *Bogardus* case.

“A clear distinction should be drawn between amounts claimed by a member under his contract with an association and amounts claimed by him by reason of his membership therein. In an Oregon case, an association that was engaged in growing apples was a member of a marketing association. The former association canceled its membership in the latter and later brought suit against this association on its contract. The court said that:

‘Under the terms and conditions of the contract, standing alone and complete within itself, the grower is entitled to receive each year the balance of any net proceeds from an annual pool, within 30 days after the receipt of the money by the association, and it is the duty of the association to render an annual statement of the receipts and disbursements of each pool. The record is conclusive that such statement was never made and such accounting was never rendered to the plaintiff; that, after paying the expenses of the association named in the contract, there is a surplus estimated to be about \$ 80,000.’

“The marketing association claimed that, by reason of a bylaw which provided that the cancellation of the standard contract shall ‘cancel and terminate the membership of such grower, together with all benefits accruing thereunder, and all voting power, right, and interest of every kind and nature shall immediately cease and terminate,’ it was entitled to retain the money in question and that the plaintiff was entitled to no part thereof. The court, however, held that the bylaws did not ‘apply to a surplus accruing from the sale and purchase of fruit and charges therefor, under an express contract, but are confined and limited to the right, title, and interest which a corporation or individual may have in and to the net assets of the association by reason of membership therein subject to the payment of all of its debts and liabilities. They do not give to the association the right to keep the money which it promised and agreed to pay another under its express contract.’ In other words, the member was entitled to nothing by reason of his membership, but was en-

titled to payment in accordance with his marketing contract.”

At page 125, the *Borgadus* case is cited among others in connection with the following statement:

“In the event an association using a purchase-and-sale contract were to fail, having on hand products or the money derived from the sale of them, a question would arise whether the members under such contracts were merely common creditors along with other unsecured creditors or whether they were preferred creditors. Apparently they would be common creditors, as this is the general rule in analogous situations in which title to goods that have not been paid for has passed. Again, when title to the products passes to an association, as is the case under the purchase-and-sale form, a creditor of the association after obtaining a judgment could seize a sufficient quantity of the products to satisfy his judgment.

“It has been said that even under a purchase-and-sale contract an association is essentially operating on an agency basis. There would appear to be more basis for this view in regard to the fiduciary duties of an association to its members than in any other respect.”

At page 155 the *Bogardus* case is cited for the following statement:

“In considering the matter of deductions a sharp distinction should be drawn between amounts in the hands of an association, arising from the sale of commodities delivered by its members and for which it may be said that the association is indebted to the members, and amounts which the association is authorized to retain out of such sale proceeds.”

At page 164 the *Bogardus* case is cited in connection with the following statement appearing on pages 163 and 164:

“The amount of all unauthorized deductions or withholdings may not properly be regarded as assets of an association; and even when an association is operating under a purchase and sale contract, money in excess

of authorized deductions, arising from the sale of commodities received by an association from its members for purposes of sale, does not constitute a part of the property of the association from the standpoint of a by-law providing that on the termination of membership the interest of a member in the property of the association shall cease. In other words, sums like those just referred to have the status of debts of the association; and, moreover, their retention is inconsistent with the nonprofit character of an association and the fiduciary relationship existing between an association and its members."

For the ready reference of the Court copies of Hulbert's book, "Legal Phases of Cooperative Associations" have been filed with the Clerk with the request that he lodge a copy with each of the judges hearing this case.

Modern cooperative marketing associations are an outgrowth of the economic needs of producers. Under the laws of forty-seven States they may be formed as corporations.¹ As corporations they are legal entities separate and apart from their members² but for the most part they are required to be so-called non-profit associations, i. e. they do not operate for their own profit nor for the profit of their stockholders or members as such, but for the profit of their members as producers.³ Herein they differ from the ordinary business corporation which operates for its own profit in the legal sense and for the profit of its stockholders in the economic sense. They are, nevertheless, capitalistic in nature,⁴ and are organized for pecuniary gain. In the ordinary corporation the economic or pecuniary gain is that of the stockholders in proportion to the capital contributed by them and in the cooperative association it is that of the members thereof in proportion to their production.⁵

¹ Nourse, "The Legal Status of Agriculture Cooperation," Macmillan 1928.

² L. S. Hulbert, "Legal Phases of Cooperative Associations, p. 28.

³ Sec. 1192 of the California Agricultural Code.

⁴ L. S. Hulbert *supra*, p. 1.

⁵ *Schuster v. Ohio Farmers' Cooperative Milk Association*, 61 F. (2d) 337 (C. C. A. 6). Therein the Court said: "Obviously, the co-operative marketing association is organized for profit in the sense of financial benefit to its

This difference in economic pattern which is brought about by provision in the bylaws of the cooperative association or in its marketing agreements or in the enabling acts, or by all of these, may spell out a difference in the legal relationship between the cooperative association and its members as compared with the legal relationship between the ordinary corporation and its stockholders. The economic or pecuniary relationship, however, remains the same whether or not the cooperative form constitutes a legal agency or a trust relationship between the cooperative association and its members as producers.

This discussion brings us to a consideration of the remaining questions propounded in the Court's Order.

Question 2. *Is it the law of California that the transfer of title of raw sugar to a cooperative by its members is from the members as principals, continuing to own the sugar, to their cooperative as agent, which holds title as agent to dispose of the sugar and return the proceeds to the members as principals?*

Answer. No. The California Agricultural Code provides as follows:

“1208. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 15 years, all or any specified part of their products or specified commodities exclusively to or through the association, or any facilities to be created by the association. *If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if*

members. The element of departure from ordinary corporate economic practice is found in the fact that the financial gain is enjoyed by the members in proportion to the production, by each, of the products handled, rather than in proportion to the capital otherwise contributed by each to the conduct of the business; but this difference of economic principle governing the distribution of wealth cannot alter the fact that the sole incentive to membership in such an association is the financial benefit to be derived therefrom in the marketing of the farm products which the member is producing. There is nothing broadly eleemosynary in cooperative associations. They simply represent a banding together of producers for their common good, and the motive of each is pecuniary gain.”

expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding 8 per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding 8 per cent per annum upon common stock.” (Emphasis supplied)

The marketing agreement (R-28) is an “agreement of purchase and sale” and provides (R-41):

“(B) Title to sugar delivered at the Port of San Francisco shall pass to the Buyer as soon as weighed at time of discharge from the ship; title to sugar for delivery at other ports shall pass to the Buyer upon arrival of vessel at port of destination;”.

The only provision of the marketing agreement under which an agency relation might exist is that contained in paragraph (E) under the heading of “Unavoidable Casualty” (R-42) which would make performance of the contract impossible.

The marketing agreement further provides (R-46):

“(O) The provisions of this agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.”

The death of the principal or agent terminates the relationship of agency (see Sees. 120 and 121, Restatement of the Law of Agency).

There is no provision in the marketing agreement for control by the producer of the manner or method of disposing of the members’ product except that his product may not be sold to another refinery company unless he so instructs (R-29).

The California Agricultural Code also provides for injunctive relief and specific performance:

“1210. In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.”

If a contract to sell is specifically enforceable it is a contract of sale and not a contract of agency (*Ansley Realty Co. v. Pope*, 105 Texas 440, 151 S. W. 525).

The California Agricultural Code also provides for limited liability:

“1206. * * * No member or stockholder shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory note given in payment thereof.”

A principal is fully liable for the acts of his agent within the scope of his authority (Section 140, Restatement of the Law of Agency).

Chapter 1, Section 1 of the Restatement of the Law of Agency contains the following definition of “agency”:

“Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”

and in Section 14 of said Restatement:

“A principal has the right to control the conduct of the agent with respect to matters entrusted to him.”

Comment c to this Section is as follows:

“c. There are many relationships in which one acts for the benefit of another which are to be distinguished

from agency by the fact that there is no control by the beneficiary. Thus, executors, guardians, and receivers, although required to act wholly for the benefit of those on whose account the relationship has been established, are not subject to their directions. A trustee, that is, one holding property in trust for another and subject to equitable duties to deal with the property for the other's benefit, may or may not be subject to control in the management of the property by the one for whose benefit he is required to act. If he is so subject, he is also an agent, and the rules stated in the Restatement of this Subject apply to him. The directors of a corporation for profit are fiduciaries having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management. The partnership relationship, while having many of the characteristics of the agency relationship, differs from it in that a partner's power to bind his co-partner is not subject to the co-partner's right of control unless there is an agreement to that effect."

The relation of agency is revocable at the will of either the principal or agent (Sec. 18 and 19, Restatement of the Law of Agency).

The marketing agreement in this case does not permit termination by either party within a contract year (see paragraph (K) (R-44, 45).

In the agency relation the agent represents and acts for the principal and his acts are binding on the principal (2 C. J. S. 1035. Note 33 and 34 citing *Taylor v. Davis*, 4 Sup. Court 147, 150, 110 U. S. 330).

Under the marketing agreement in the case at bar petitioner in the comparable position of agent does not act for each producer who would occupy the comparable position of principal, but with respect to the product of each producer acts for all the producers.

Sec. 8 of the Restatement of the Law of Trusts distinguishing trusts and agency contains the following comment:

"a. *Title.* A trustee has title to the trust property; an agent as such does not have title to the property of

his principal, although he may have powers with respect to it.

“b. *Control*. An agent undertakes to act on behalf of his principal and subject to his control (see Restatement of Agency, § 1); a trustee as such is not subject to the control of his beneficiary, except that he is under a duty to deal with the trust property for his benefit in accordance with the terms of the trust and can be compelled by the beneficiary to perform this duty.

“c. *Liability*. An agent may subject his principal to personal liabilities to third persons; a trustee cannot subject the beneficiary to such liabilities (see § 274).

“d. *Consent*. An agency is created by the consent of the principal and the agent (see Restatement of Agency, § 1); a trust may be created without the knowledge or consent of the beneficiary or of the trustee (see §§ 35, 36).

“e. *Termination*. An agency can be terminated at the will of either the principal or the agent and is terminated by the death of either (see Restatement of Agency, §§ 118-121). A trust is not ordinarily terminable at the will of either the beneficiary or the trustee or by the death of either (see §§ 330, 337).

“f. *Agent may also be trustee*. A person may be at the same time both an agent and a trustee for the same person. If an agent is entrusted with the title to property for his principal, he is a trustee of that property.”

From the foregoing we conclude that it is not the law of California that the transfer of title of raw sugar to a cooperative by its members is from the members as principals, continuing to own the sugar, to their cooperative as agent, which holds title as agent to dispose of the sugar and return the proceeds to the members as principals.

But if the contrary view should prevail then there is authority for holding that a refund of the processing tax may be made in a suit by the principal and agent jointly. See *Cheek et al v. U. S.* (40-2 U. S. T. C. par. 9687, affirmed C. C. A. 6, 126 F. (2d)1) where just that was done.

In filing the claim for refund in 11488 petitioner took the precautionary step of having all its members join in that

claim "to the extent that they may be necessary, legal or equitable parties" by the execution under oath of Schedule 3 by all of such members (R-73-78). If it should be the view of the court that petitioner paid the processing tax acting as agent for its members as principals and that said members as principals were necessary parties to this action in the Tax Court then it would be appropriate for petitioner to have leave to amend the petition in the Tax Court by joining its members as parties to the petition.

Question 3. *Is it the law of California that such a transfer transfers the sugar to the cooperative as trustee of a trust of which the selling members are beneficiaries and the provisions of the trust are the terms of the contract of sale?*

Answer: Yes. All the necessary elements of a complete trust are present in the transaction in which petitioner's members deliver raw sugar to petitioner as a cooperative association organized under the laws of California under the marketing agreement which imposes a duty upon petitioner to account to its members.

An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is; it is sufficient that what they appear to have in mind is in its essentials what the courts mean when they speak of a trust (sec. 2.8, 1 Scott on Trusts 37).

Chapter 1, section 2 of the Restatement of the Law of Trusts defines a trust as follows:

"A trust, as the term is used in the Restatement of this Subject, when not qualified by the word 'charitable,' 'resulting' or 'constructive,' is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."

Comment "h. The elements of a trust. As appears in this Section a trust involves three elements, namely, (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit

of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property, which is held by the trustee for the beneficiary."

Scott in analyzing the above definition of a trust has this to say (Section 2.3, 1 Scott on Trusts 32-33):

"In this definition or description the following characteristics are to be noticed: (1) a trust is a relationship; (2) it is a relationship of a fiduciary character; (3) it is a relationship with respect to property, not one involving merely personal duties; (4) it involves the existence of equitable duties imposed upon the holder of the title to the property to deal with it for the benefit of another; and (5) it arises as a result of a manifestation of intention to create the relationship. The combination of these things characterizes the notion of the trust, as that notion has been developed in the Anglo-American law."

Applying these tenets to the situation in the case at bar we find:

1. The relationship between petitioner as a cooperative association and its members as producers is a fiduciary relationship.⁶

2. This relationship is with respect to property—the raw sugar produced by the members as it is delivered under the marketing agreement and title thereto passed to petitioner.

3. Petitioner has the equitable duty to account to and for the benefit of its members.

4. The manifestation of intention to create the relationship is implicit in the organization of petitioner as a non-profit cooperative marketing association under the laws of California for the profit or benefit of its members and the entering into the marketing agreement involving the duty to account.

⁶L. S. Hulbert "Legal Phases of Cooperative Associations," p. 5, citing among other cases *Bogardus v. Santa Ana Walnut Growers Association*, 41 C. A. 2d 939; 108 Pac. 2d 52.

There are present in the situation in the case at bar all of the components of a trust relationship—settlor, trust property, trustee, and beneficiary (Section 3, Restatement of the Law of Trust).

Each member (they contracted severally, R-54) became a settlor of the trust fund for each contract year by delivering raw sugar to the petitioner in accordance with the terms of the marketing agreement.

The raw sugar so delivered with passage of title to petitioner was the trust property.

Petitioner by taking title to the raw sugar under the marketing agreement with the duty to account to its members for the proceeds thereof was in the position of a trustee.

Petitioner's members in the aggregate for whose benefit the raw sugar was sold are the beneficiaries of the trust.

We have seen above that a trust differs from an agency. The trust also differs from a debt. This difference lies principally in the fiduciary relationship based on the duty to account which exists in a trust but does not exist in a debt. This difference has its origin first in the distinction between the common law action of account and action of debt and later in the distinction between actions at law and in equity. (See Sec. 12, 1 Scott on Trusts 82).

From the foregoing we believe it may be properly held that it is the law of California that such a transfer transfers the sugar to the cooperative as trustee of a trust of which the selling members are beneficiaries and the provisions of the trust are the terms of the contract of sale.

In the petitioner's initial brief before this Court this question was touched upon (P-27) as follows:

“The only legal difference between the position of petitioner's members as producers and the common stockholders of the ordinary corporation with respect to profits from operations is one of time of accounting, and in examining ultimate effects the time element is not material. An Agricultural Cooperative accounts to its members on a crop basis or annually, and sometimes oftener depending on the kind of product han-

dled. Petitioner accounted to its member-producers on the annual basis of a fiscal year ending November 30. An ordinary business corporation may account annually or oftener by way of distributing dividends from profits, but must in all events account fully to its common stockholders on liquidation. In both accountings, regardless of the time when they occur, any burden borne by either the cooperative or the ordinary corporation will be reflected in the amounts received by the persons entitled thereto. The immediate economic effects in both are the same.

“The similarity of petitioner and its members as producers with a partnership and its members, or with a trustee and his beneficiaries with respect to accounting for profits is perhaps even more pointed. The profits of a partnership are either distributed or credited to the members annually because they belong to the members. Likewise in the case of a trustee, he will either distribute any profits of his business to his beneficiary or accumulate them for his benefit very much the same as petitioner accounts annually to its members as producers. In all these situations if the business entity has borne some burden chargeable to operations, such as a processing tax, there will be less to account for or pay to the member as producer of the product, to the common stockholder, to the partner, and to the trust beneficiary.

“The real question in these situations is: whether this lessening of the profits which would have otherwise accrued to the benefit of the member, stockholder, partner or beneficiary if the tax had not been paid, constitutes a shifting of the burden of the tax to them by their respective business organizations.”

Question 4. *If the transfer of title of the sugar is in such a trust does the cooperative as trustee, by paying the processing taxes out of the corpus of the trust, shift the burden of the taxes by the reduced amount distributed to the beneficiary members?*

Answer. No. Petitioner was liable for and paid the tax as the processor. As such processor its capacity was that of a trustee for the benefit of its members as beneficiaries. The members' beneficial interest was in the net proceeds of

petitioner's operations as such trustee—not in the gross proceeds. The net proceeds to which the members' beneficial interest attached was determinable only after deducting all authorized expenses which the petitioner as trustee incurred. The taxes imposed were an authorized expense.

The extent of the interest of the beneficiary of a trust depends upon the manifestation of intention of the settlor (Sec. 128, Restatement of the Law of Trusts).

In this case there is a specific provision of the marketing agreement manifesting this intention as follows:

“The remainder, after the deductions above enumerated, shall constitute the total payment” (R-62).

“Total payment” as here used represents the entire beneficial interest of the members in the trust formed by their delivery of raw sugar to the petitioner under the marketing agreement.

While an agent represents and acts for his principal, as we have seen above, a trustee has no principal (Taylor v. Davis, *supra*) and cannot render the creator or beneficiary of the trust liable for his contracts (Sec. 275, Restatement of the Law of Trusts).

A trustee, on the other hand, is liable for his contracts both as trustee and, personally if his trust assets are insufficient to indemnify him. (Sec. 261-263, Restatement of Law of Trusts).

As in the case of all representative or artificial entities where a burden or liability is borne by such entity in its representative capacity the effects thereof are felt by those persons having the beneficial, economic or pecuniary interest in the assets of such entity. But this economic tenet does not mean that there is in such a situation a shifting of the burden or liability from the representative entity upon which it was placed to the persons beneficially or pecuniarily interested therein.

Congress in enacting Title VII of the Revenue Act of 1936 did not intend to bar recovery in any such situation.

To have so provided specifically would have confined all refunds of the invalidated processing taxes to natural persons acting in their individual capacity and this would constitute a denial of the equal protection of the law and the denial of due process contrary to the Constitution. The government made no contention for such an interpretation in the case of *Anniston Manufacturing Company v. Davis*, 301 U. S. 337, 57 Sup. Ct. 860, in which the constitutionality of Title VII as there interpreted was tentatively upheld.

Except in the instant case thus far the law has not been so construed either administratively or judicially.

We have no way of knowing or citing the many administrative cases of refund that have been made. The reported cases in which refunds to ordinary business corporations have been judicially determined are numerous and the question of the shifting of the burden to the stockholders having the economic or pecuniary interest in the assets of the corporation has never been raised.

Counsel for petitioner has examined the dockets and files of the now defunct Processing Tax Board of Review and its successor in jurisdiction, the Tax Court of the United States, and has found the following cases where refunds have been determined, of trustees, receivers and executors or administrators and one partnership as the titles of the cases will indicate. The decisions of these cases are nowhere reported and counsel therefore hesitates to cite them. They are cited with as much accuracy and detail as possible for the proposition that refunds have been made to persons occupying a representative fiduciary capacity such as that of petitioner. Certified copies of the orders deciding these cases have been requested from the Clerk of the Tax Court and if obtained will be sent on to the Clerk of this Court. As a note to each of the cases cited counsel indicates by whom the tax in question was paid which is revealed only by a comparison of the dates of the payment of the tax with the date of the appointment of the fiduciary representative filing the petition therein.

George J. Lockner, Trustee in Bankruptcy of Bloecher & Schaaf, Inc. v. Commissioner PTBR Doc. No. 76. Order entered April 21, 1939. Refund due, \$10,000. Note: Tax paid by corporation before receiver's appointment.

Doris Sindlinger, Administratrix of the Estate of C. P. Sindlinger v. Commissioner PTBR Doc. No. 88. Order entered Nov. 12, 1940. Refund due, \$4496.12. Note: Tax paid by administratrix.

L. J. Blakey, receiver for Mebane Flour Mills, Inc. v. Commissioner. PTBR Doc. No. 228. Order entered May 5, 1940. Refund due, \$4,509.12. Note: Tax paid by corporation before appointment of the receiver.

G. C. Byars, Trustee in Bankruptcy for Summerville Cotton Mills v. Commissioner. PTBR Doc. No. 234. Order entered December 7, 1942. Refund due, \$17874.28. Note: Tax paid by corporation before receiver appointed.

King-Perkins Bag Co., a copartnership v. Commissioner PTBR 347. Order entered April 29, 1942. Refund due, \$2,572.92. Note: Tax paid by partnership.

George W. Mount Castle, receiver for Pamona Mills, Inc., v. Commissioner, PTBR Doc. No. 368. Order entered Feb. 17, 1942. Refund due, \$8,500. Note: Tax paid by receiver after appointment.

Powers-Beggs & Co. Lewis Kelly v. Commissioner. PTBR Doc. No. 391. Order entered Nov. 10, 1942. Refund due, \$6,203.76. Note: Tax paid by receiver after appointment.

James F. Kelley and Roy D. Marshall, receivers for Croeninger Packing Co., Inc. v. Commissioner. PTBR Doc. No. 407. Order entered Dec. 16, 1943. Refund due, \$8,144.15. Note: Tax paid by corporation before receivership.

In none of these cases was the point raised that the fiduciary claimant had shifted the burden of the tax to his beneficiary although in those cases where the fiduciary paid the tax the point would have been available if it is available in the case at bar.

From the foregoing we conclude that the transfer of title of the sugar being in such a trust the cooperative as trustee, does not by paying the processing taxes out of the corpus of the trust, shift the burden of the taxes by the reduced amount distributed to the beneficiary members.

Question 5. *Under the facts alleged in the petitions to the Tax Court, if the sugar be resold by the cooperative at a net loss, does the loss fall on the beneficiary members or on the capital of the cooperative trustee?*

Answer. The net loss as we understand the term, would fall upon the capital of the cooperative trustee. As we understand the term "net loss" as used in this question it means the loss that would result if petitioner resold the sugar delivered by its members for a total price which when added to its other income, was insufficient to cover its operating expenses and other authorized deductions, without attributing to or deducting any amount as the cost of the raw sugar delivered by its members. Such a situation is barely conceivable but if it should occur the loss would definitely fall on petitioner's own capital rather than on its members as producers. This result is based on three grounds:

1. The California Agricultural Code contains the following provision:

"1206. * * * No member or stockholder shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory note given in payment thereof."

2. The marketing agreement makes no provision for charging the member-producers with such loss.

3. A trustee cannot subject his beneficiary to liability to third persons from which such "net loss" would result (see Restatement Law of Trust, Sec. 274).

On the other hand, if what is meant by the term "net loss" is where petitioner should fail to resell the sugar de-

livered by its members at a price which when added to other income, was insufficient to cover its operating expenses and other authorized deductions, *and the advances which petitioner made to its members toward and on account of the "total payment" provided in the marketing agreement*, then a different result would follow. Such a situation would constitute an over-advance and the net loss resulting therefrom would be recoverable from those members to whom the over-advance had been made. This conclusion is based on the fact that under the cooperative method of operation and under the marketing agreement in this case as alleged in paragraphs V (15), (16) and (17) (R 11-12) each member must receive the exact same amount per unit as each other member adjusted only for polarization premium or penalty—quality.

With respect to over-advances by a cooperative association Hulbert, "Legal Phases of Cooperative Associations," pages 145 and 147, has this to say:

"Cooperative associations frequently make advances or partial 'payments' to their members on receipt of their products. The question arises, in the event the advances or payments made exceed the amount to which the member is entitled, after deducting marketing expenses and all other authorized deductions from the sales returns, may the association recover the amount of such excess advances or payments from the member? The answer is 'Yes.' The basis for the recovery is the doctrine that no man shall be allowed to enrich himself unjustly at the expense of another or shall be allowed to retain money that in 'equity and good conscience' belongs to another."

* * * * *

"When excess advances or payments are made by an association that functions on a pool basis, there is always the strong possibility that some members have received less than they were entitled to; whereas other members have received more than the amount to which they were entitled. This situation would provide an additional reason for allowing an association to recover excess advances. The principles under discussion are

applicable, even in cases in which an association in its contract agrees to make an advance of a specified amount to growers, which amount proves to be excessive, because both parties assume that the products will bring a net amount larger than the advance. If this assumption proves to be incorrect, the necessary adjustments are in order. The association contracts to pay to its members only the net amount received by it for their products, minus authorized deductions. If more is paid, a member has received something to which he has no claim. No reason is apparent why these principles would not be as applicable to an unincorporated as to an incorporated association; and, in a Kentucky case involving an unincorporated association, the members were held liable for over-advances made to them."

Since petitioner's cost of raw sugar delivered by its members depends entirely upon there being net proceeds from petitioner's entire operations, if there are no net proceeds the raw sugar acquired from them would have no cost.

We conclude that "a net loss" determined on this basis would fall on the capital of petitioner for the reasons above stated.

Respectfully submitted,

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Nos. 11488-11489

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPO-
RATION, A CORPORATION, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITIONS FOR REVIEW OF DECISIONS OF THE TAX COURT
OF THE UNITED STATES**

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

THERON L. CAUDLE,
Assistant Attorney General.

SEWALL KEY,

LEE A. JACKSON,

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Special Assistants to the Attorney General.

FILED

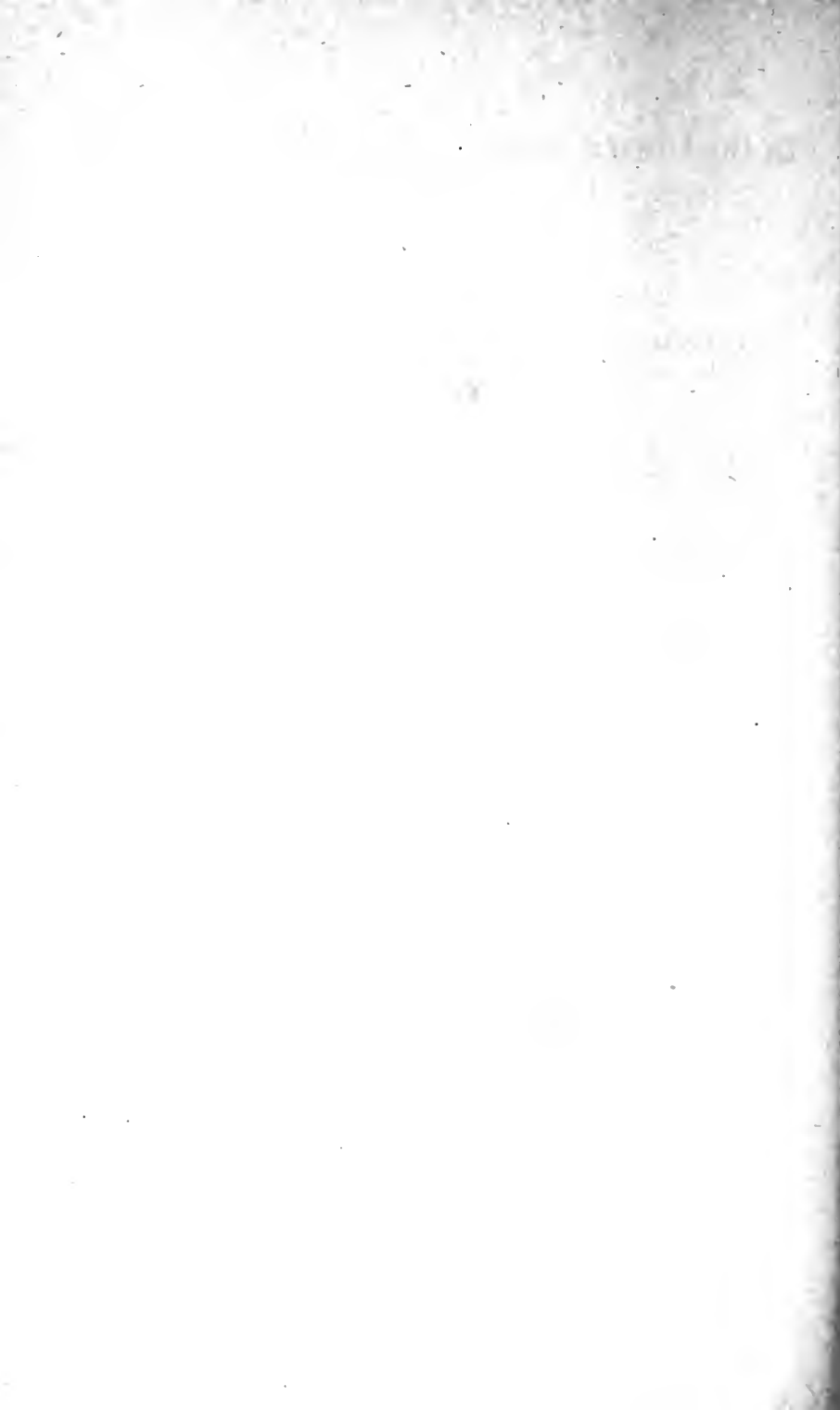
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In the United States Circuit Court of Appeals for the Ninth Circuit

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**CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPO-
RATION, A CORPORATION, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF DECISIONS OF THE TAX COURT
OF THE UNITED STATES*

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

This supplemental brief is submitted on behalf of the Commissioner of Internal Revenue in response to the order of this Court entered July 21, 1947, setting out five questions to which the Court desires answers.

1. The first question asked by the Court is whether the records in these cases require the Court to sustain the Commissioner's disallowance of the refund claims involved because such claims were not properly verified and the evidence submitted to the Commissioner in connection with the claims was not under oath, as required by the applicable statute and Treasury Regulations. The parties since have stipulated that the respective claims were not defective in this respect and the answer to the first question is "no".

2. The second question asked by the Court:

Is it the law of California that the transfer of title of raw sugar to a cooperative by its members is from the members as principals, continuing to own the sugar, to their cooperative as agent, which holds title as agent to dispose of the sugar and return the proceeds to the members as principals?

By way of suggesting the reason for this and the remaining questions asked, the Court quotes from the decision of the Court of Appeals of the State of California in *Bogardus v. Santa Ana W. G. Assn.*, 41 Cal. App. 2d 939, 108 P. 2d 52, which was not cited by counsel in their original briefs in this case dealing with the relationship between the cooperative and its members involved in that case.

Counsel for the Commissioner are sorry if they have inconvenienced this Court by failing to cite and discuss the above case and other cases of a similar nature, or by failing to discuss more fully in their earlier brief the questions in which the Court is interested. The failure to discuss these matters more fully was due to the fact that counsel did not deem them material to a determination of the narrow questions involved. For instance, the agency question, insofar as these cases are concerned, seems to be fully answered by the record and the federal statutes involved. At no time has the cooperative dealt with the Government as agent of its member producers. As a first domestic processor of sugar the cooperative was

liable for,¹ and paid, the processing tax involved on its own account. Is liability for the tax arose from the act of processing raw sugar, not from any relationship it bore to its member producers. The member producers were not first domestic processors of sugar within the meaning of the Agricultural Adjustment Act,² hence they were not liable for the tax, and the taxpayer could not have paid the tax for them as their agent.

Whether the taxpayer was processing the sugar received from its member producers as their agent or on its own account was unimportant under the provisions of the law and the Treasury Regulations in effect at the time the processing was done and the tax was paid. After enactment of Title VII of the Revenue Act of 1936, c. 690, 49 Stat. 1648, however, it became important in the selection of remedies for recovery. Ample authority is cited in the Commissioner's original brief to show that the remedial provisions of Title VII are limited to the person who was liable for and who actually paid the tax. But the provisions of Title VII provide different remedies for taxpayers who paid a processing tax as a result of processing a commodity on their own account and those who paid a

¹ See Section 9 (a) of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the Act of May 9, 1934, c. 263, 48 Stat. 670; T. D. 4441, XIII-1 Cum. Bull. 501 (1934); T. D. 4549, XIV-1 Cum. Bull. 462 (1935); Article 11, Treasury Regulations 81.

² Section 9 (d) (6) of the Agricultural Adjustment Act, *supra*, as amended by the Act of May 9, 1934, *supra*; T. D. 4441, *supra*; T. D. 4549, *supra*.

tax upon the processing of a commodity for another for a fee or charge. Section 906 of the 1936 Act created the old Processing Tax Board of Review³ and gave it exclusive jurisdiction to review the Commissioner's allowance or disallowance of claims for refund of amounts paid as "processing tax," as defined in Section 913 of that Act, while Section 903 of the Act gave concurrent jurisdiction to the District Courts and the Court of Claims over suits for refund of all other taxes paid under the Agricultural Adjustment Act.⁴ Jurisdiction was denied the Processing Tax Board of Review (Tax Court) in cases where the amount claimed as a refund represented taxes paid upon the processing of a commodity for another for a charge or fee by the simple expedient of defining a "processing tax" over which the Board was given jurisdiction to exclude such taxes paid upon the processing of a commodity for another for a charge or fee. Section 913 (b) of the 1936 Act; *Arabi Packing Co. v. Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645. Compare *Fuhrman & Forster Co. v. Commissioner*, 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686; *Lindner Packing & P. Co. v. Commissioner*, 118 F. 2d 656 (C. C. A. 10th). Hence, if this taxpayer were now claiming to have acted in an agency capacity during the tax period,

³ Abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its jurisdiction and functions transferred to the Tax Court.

⁴ The reason for providing these separate remedies is explained in S. Rep. No. 2156, 74th Cong., 2d Sess., p. 32 (1949-1 Cum. Bull. (Part 2) 678).

processing the sugar of its member producers for a charge or fee, this Court very definitely would have to dismiss the appeals for lack of jurisdiction.

However, the taxpayer has disclaimed any notion of acting as agent for its member producers in the processing of their sugar during the tax period involved. It not only was required to, and did, file the returns and pay the processing tax on its own account, but the refund claims on which these proceedings were based were filed on its own account as the taxpayer, the proceedings below were instituted by it on its own account as the processor who paid the tax and was entitled to claim the refund, the statements attached to its refund claim were intended to show that as the taxpayer it bore a substantial part of the burden thereof, and in its original brief before this Court it definitely states (p. 20): "Petitioner did not file the claims and petitions in the cases at bar as agent". This statement seems to be fully justified under the terms of the agreement between the taxpayer and its producer members, which the Tax Court properly construed to be a contract of purchase and sale. (No. 11,488, R. 104-105.) Therefore, insofar as the present case is concerned, it would seem that the answer to the second question of the Court should be "no".

However, the second question as framed by the Court apparently contemplates an answer which would be decisive in all cases involving the relationship between cooperatives and their members under California law. We do not believe the question as framed will permit of a categorical "yes" or "no" answer.

Such an answer would of necessity eliminate or seriously limit any consideration of any marketing agreement between the cooperative and its producer members. This would seem to be inadmissible under the provisions of the Agricultural Code of California (Sections 1191-1221) dealing with cooperatives. Within the provisions of their charter and by-laws, cooperatives are given wide latitude in contracting with their members,⁵ and Section 1208 of the Agricultural Code of California, relating to marketing contracts, specifically provides that:

The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over fifteen years, all or any specified part of their products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight percent per annum, and reserves for retiring the stock, if

⁵ See Sections 1208, 1216, and 1221 of the Agricultural Code of California.

any; and other proper reserves; and interest not exceeding eight percent per annum upon common stock.

It is conceivable that a contract of agency could be entered into by the cooperative and its producer members under the above provision, but we find no decision by any California court which holds that as a matter of law the relationship between the cooperative and its producer members is one of agency. Rather, the relationship in each case is generally made to turn upon the provisions of the cooperative's bylaws and its agreement with its members or upon general principles of equity. Cf. *California etc. Assn. v. Ridge L. & N. Co.*, 199 Cal. 168, where the marketing agreement specifically designated the cooperative as "agent" of the producer. See, also, *Poultry Producers etc. v. Barlow*, 189 Cal. 278.

3. The third question asked by the Court:

Is it the law of California that such a transfer [of title] transfers the sugar to the cooperative as trustee of a trust of which the selling members are beneficiaries and the provisions of the trust are the terms of the contract of sale?

If this question contemplates a categorical "yes" or "no" answer applicable to all cooperatives under California law, regardless of the contractual arrangement with their member producers, we find the same difficulty answering it as we do with respect to the second question discussed above. We have found no California decision which seems to be all-inclusive. Here, again, the decision in each case seems to depend upon the particular arrangement between the cooperative

and its members as disclosed by its by-laws and the marketing or other agreement under which it operates. This is true of *Bogardus v. Santa Ana W. G. Assn.*, *supra*, quoted from in this Court's order of July 21, 1947. In that case the appellants were contending that the marketing contracts were contracts of purchase and sale (p. 948), but the Court of Appeals held that the agreements between the local association and its members and between the central association and the local associations created a fiduciary relationship between them. The reasoning with which the court supported its conclusion is thoroughly convincing, but it cannot be accepted as a general proposition of law applicable to all California cooperatives regardless of their contractual arrangement with their member producers. *Mountain View, etc. v. California etc.*, 19 Cal. App. 2d 227, 65 P. 2d 80, upon which the court relied to some extent in the *Bogardus* case, involved the same marketing agreements and in that case the court pointed out that the parties had agreed that the funds involved were held in trust by the central association. Both suits were for an accounting under the particular marketing agreements involved and the comments in the *Bogardus* case with respect to the fiduciary relationship of the parties seem unnecessary to the decision of the question involved.

The other cases cited in the *Bogardus* case, *supra*, also are suits between cooperatives and their members, involving alleged breach of contract and claims for damage or an accounting. The rights of the parties in each instance depend upon the particular contract involved and general equitable principles. If this

were a similar action between the California and Hawaiian Sugar Refining Corporation and its producer members under their marketing contract, it is conceivable that for certain purposes, such as enforcing the contract or ordering an accounting, a court would view the case as involving a fiduciary relationship.

In *San Joaquin V. P. Producers' Ass'n v. Commissioner*, 136 F. 2d 382, this Court cited the *Bogardus* and *Mountain View* cases, and *Reinert v. California etc. Exchange*, 9 Cal. 2d 181, in support of its holding that the amounts which the Commissioner sought to tax to the cooperative in that case represented "net proceeds," resulting from operation of the cooperatives' business which never became the property of the cooperative. But that result was reached upon a consideration of the association's by-laws and the marketing agreement with its members. It would not necessarily follow that the same result would obtain under every marketing agreement. Instead, it seems that if a fiduciary relationship is to be imputed to the parties in a cooperative case it would arise as a result of their dealings with each other rather than by reason of the general provisions of the California Agricultural Code. Compare *Reinert v. California etc. Exchange*, *supra*, and *Cooperative D. League v. Hansen*, 23 Cal. App. 2d 493, 73 P. 2d 627.

As was stated with respect to the second question discussed above, counsel for the Commissioner did not discuss the relationship between this taxpayer and its producer members because the subject did not appear material to a determination of the narrow question

here involved. Regardless of the capacity in which the taxpayer acted in processing the sugar it did during the tax period, it was liable for the tax as a first domestic processor of raw sugar. Cf. *Savannah Sugar R. Corp. v. Commissioner*, 121 F. 2d 426 (C. C. A. 5th). Having been made liable for the tax, and having paid it as its own tax, it was the only one entitled under Title VII of the Revenue Act of 1936 to claim and sue for a refund. It claimed the refund on this basis, and submitted certain evidence which it insists shows that it bore at least a substantial part of the burden of that tax, which is a necessary condition to recovery under the statute. As pointed out above, if it refined the sugar for its producer members for a charge or fee it cannot recover in this action. Furthermore, if any theory of fiduciary relationship could be deemed determinative of its right to recover it would be precluded from recovering in this action. Its refund claims are not based on any such ground. The evidence submitted with its claims would not support an action for refund on any such ground, and no refund could be allowed on a ground not set forth in the refund claim. *Angelus Milling Co. v. Commissioner*, 325 U. S. 293; *Vica Co. v. Commissioner*, 159 F. 2d 148 (C. C. A. 9th); *Cherokee Textile Mills v. Commissioner*, 160 F. 2d 685 (C. C. A. 6th).

Although the order of this Court does not indicate any interest in the subject, the fact that title of the stock of the taxpayer was in voting trustees can have no bearing upon the issues involved.

4. The fourth question asked by the Court:

If the transfer of title of the sugar is in such a trust does the cooperative as trustee, by paying the processing tax out of the corpus of the trust, shift the burden of the taxes by the reduced amount distributed to the beneficiary members?

If in framing this question the Court used the term "corpus" advisedly, the question is a purely theoretical question for which there is no basis in the record. If a trust is assumed, which we do not admit insofar as these cases are concerned, the trustee would as a general proposition of law be required to pay operating expenses, which includes the taxes here involved, out of operating income rather than out of the "corpus" of the trust so long as operating income were available. And we submit there can be no question in these cases, on the facts shown by the record, that the taxes here involved were paid out of current operating income.

If by its question this Court intended the term "corpus" to include current operating income of the taxpayer, we think it is clear from the terms of the taxpayer's agreement with its producer members that, as held by the Tax Court, the burden of the tax involved was shifted in the first instance to—or more specifically, was assumed by—the producer members. Where the burden ultimately rested, whether upon the producer members or upon the purchasers or consumers of the refined sugar, is immaterial to the question here involved.

5. The fifth question asked by the Court:

Under the facts alleged in the petitions to the Tax Court, if the sugar be resold by the cooperative at a net loss, does the loss fall on the beneficiary members or on the capital of the cooperative trustee?

We regret we are not sure what the Court means by "net loss" in this question. If by "net loss" the Court means the loss that would result if the taxpayer resold the sugar delivered to it at a price which, when added to all other income, was insufficient to cover its operating costs and other deductions authorized by the agreement with its producer members, without considering any advances to such members as cost of sugar purchased, we think the answer would be "yes" because the contract does not provide for the recovery of any such loss from its members. See also, Section 1206 of the Agricultural Code of California. But such a situation would seem highly improbable. We answer the question in this manner because we do not think the Court intended to include as an element of cost in computing a "net loss" any part of the initial payment or other advances to its members on account of sugar delivered by them. While the particular contracts here involved do not specifically so provide, we believe that if the proceeds received from the sale of sugar, plus all other income of the taxpayer, were insufficient to cover all expenses plus other authorized deductions—except the 6% which the taxpayer is authorized to retain for its own purposes—the taxpayer would be entitled to recover from its producer members any advances which later proved to be in

excess of the total amount to which they were entitled under the contract. Thus, if the proceeds received from the sale of the sugar, plus all other income, exceeded all expenses and other authorized deductions any further loss would apparently fall upon the producer members.

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AUGUST 1947.



No. 11,500

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA WESTERN STATES LIFE
INSURANCE COMPANY, a Corporation,

Appellant,

vs.

CAROLYN H. VAUGHN, a widow and
JOHN ALFRED VAUGHN, and JOAN
MARILYN VAUGHN, by their guardian
ad litem,

Appellees.

No. 11,500

BRIEF OF APPELLES

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No. 11,500

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA WESTERN STATES LIFE
INSURANCE COMPANY, a Corporation,

Appellant,

vs.

CAROLYN H. VAUGHN, a widow and
JOHN ALFRED VAUGHN, and JOAN
MARILYN VAUGHN, by their guardian
ad litem,

Appellees.

No. 11,500

BRIEF OF APPELLES

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STATEMENT OF THE CASE

JAMES ALFRED VAUGHN, the deceased, a resident of Snohomish County, Washington, had been repeatedly solicited by W. Guy Hubbard agent of the plaintiff, to induce him to buy insurance on his life in the plaintiff company, such solicitation having taken place over a period of many years. (R 176).

On or about ^{Sept.}~~April~~ 17th or 18th, 1945, W. Guy Hubbard, agent of the plaintiff, without request of the deceased called at the home of the deceased and talked with him for a period of approximately one and one-half hours, during which period of time the agent sold the deceased a policy of insurance subject to the lawsuit herein. The agent of the company, W. Guy Hubbard, did have difficulty in convincing the deceased that he should at that time take out insurance on his life with the plaintiff company for the reason that the deceased was anticipating a raise in wages and desired to wait until such raise of wages was received before purchasing a policy of insurance. (R 226, 233).

The deceased was a man approximately 37 years of age, in extremely good health and athletically inclined, and at all times immediately prior to his death was actively engaged in outdoor activities. (R 216, 218).

On or about the 3rd day of April, 1945, the deceased called at the office of the family physician, Dr. James A. Durant, and talked with him concerning (R 94) a certain amount of distress in the abdomen. The examination made by the doctor is not clear or certain, but it was known that the doctor in making his limited examination did not take a blood count, found the deceased to have a normal temperature, normal pulse rate, to be in good health, in good weight and in good physical condition (R 103). The doctor also found that the deceased did not appear to be suffering pain and that tenderness could only be elicited from the deceased and upon pressure (R 103, 104). The evidence further showed that the deceased visited Dr. James A. Durant on May 22nd and on September 10th, 1945, and that on each of these occasions the deceased did not appear to be suffering pain, had no temperature, appeared to be in good physical condition, had lost no weight, and only elicited tenderness upon deep pressure. On all of these occasions the doctor did not take any blood count or make any thorough examination, nor at any time did the pulse of the deceased indicate that he was sick or was suffering, except on the examination made on September 25, 1945, the date immediately preceding the date of operation. (R 103, 104 105). (Date of examination for policy was September 18, 1945).

The doctor testified that the deceased had a mild attack of appendicitis and that the only cure, was to have it removed. (R 90). The doctor stated that the deceased did not think that it was serious enough to have anything done about it. (R 108).

Following the solicitation by the agent of the plaintiff insurance company for the policy herein sued upon, the deceased went to the office of the company's doctor, Dr. Tuohy, who made a thorough examination of the deceased, including a manual examination of the stomach with his hand in order to determine whether or not there were any growths or lumps within the abdominal cavity of the deceased. (R 159). The company's examining physician in making this examination, found no growths within the stomach cavity and found no regions which were sensitive. (R 159). The examining physician also found that on the 18th day of September, 1945, the deceased had a normal temperature, a normal pulse rate, and a normal blood pressure, heart absolutely normal, urinal examination good, and that the deceased was in excellent physical condition. (R 158, 159). The examining physician also stated that even though he would have known that the deceased had consulted Dr. Durant and knew what Dr. Durant knew, that he would have passed the deceased as an insurable risk. (R 153).

The deceased signed the answers made to the medi-

cal examiner (R 153) and in answer to question 16, which question was:

“What illness, disease, accident or operation have you ever had and for what conditions have you consulted a physician? Describe fully.”

Answered: “Never sick.” (R 153).

The answers to the following questions were in line with such answer. From examination of the medical report it will appear that the mother, 77 years old, and father, 85 years old, and eight brothers and sisters of the deceased, were living and in good health; that the examining physician had known the deceased for twenty years and considered him robust, stocky, of good color, vigorous, and had recommended the deceased as a first class risk. The company’s physician and the decedent’s physician testified that the general reputation of the deceased for truth and veracity in the community of Snohomish, Washington, prior to his death, was very fine. (R 166, 125).

Dr. Roscoe E. Mosiman a cancer specialist, was called by the plaintiff, and in answer to the following question stated:

Q. Is it quite possible, then, in your opinion, he might not have realized that he was suffering from anything in particular except discomfort? (R 134).

A. I think—oh very decidedly. Very few persons,

except some nervous, high-strung individuals, assumes that he has cancer because he has a little discomfort in his abdomen. (R 135).

The doctor further stated that it was his opinion that the deceased might be uncomfortable and by reason of such condition be awakened at night during this period of time. R. 136).

The wife of the deceased, however, testified that she could recall no occasion which her husband had difficulty sleeping and that she was cognizant of the fact for the reason that she was not well and was awake during the night on many occasions.

Throughout all the testimony it is evident that the deceased did not lose any work on account of sickness at any time during the previous ten years, and was considered by his fellow workmen and friends as a husky, robust man. According to the evidence, the deceased at no time made any complaints to anyone that he was in ill health nor did his actions in any way indicate that he was suffering from pain.

The deceased died on the 19th day of November, 1945, and following his death, proof of death was submitted by the beneficiaries and received by the company in the latter part of November, 1945. (R 237).

On the reverse side of the insurance policy, being

that portion that would appear to the holder of the policy if the same had been folded and placed in an envelope, were marked these words in fairly large print:

“IMPORTANT—The company should be notified at once of the death of the insured. It is not necessary to employ any person to collect the benefits due under the policy. Save time and expenses by communicating direct with the company.” (R 421).

On the 31st day of January, 1946, the plaintiff company commenced its action in the District Court of the United States for rescission of the policy of insurance issued on the life of the deceased, and forthwith at the same time secured an injunction enjoining the beneficiaries from instituting a suit for the collection of the proceeds of the said insurance policy.

According to the evidence, the company gave the beneficiaries no notice that they should employ anyone to assist or advise them on how to recover on the policy; nevertheless, without notice, the company brought the action of rescission and secured an injunction against the beneficiaries bringing an action on the policy.

A motion to dismiss the injunction was presented and denied, and following of same, the defendants filed their Answer to the Complaint and Cross-complaint

being suit upon the policy, and demand for jury was noted on the Answer as to issues arising on the Cross-complaint.

The three major questions as set forth in page eight of the appellant's Brief are substantially the three major questions involved in this appeal.

ARGUMENT OF CASE

I

Under the Evidence was Vaughn guilty of fraud as a matter of law.

The Court, in its memorandum decision denying motion for new trial stated:

"The Houston case fits this case almost precisely." (R 426).

The case of *Houston vs. New York Life Insurance Company*, 166 Wash. 611, 8 Pac. 2nd, 434, involves a case wherein the issues and facts presented therein are substantially the same as the issues and facts presented in this case.

In the Houston case, *supra*, the insured held a policy of insurance which had lapsed because of non-payment of premium and subsequently the defendant made application for reinstatement of policy. He was then required to answer questions propounded to him, which involved substantially the same questions as presented

in this case; that is, whether or not the defendant had suffered any illness or disease and whether or not the insured had consulted any physician or physicians during the past twenty-four months. The deceased failed to answer that he had consulted a physician as to a mild acute attack of appendicitis, and had been advised as to an operation.

The physician in the Houston case, *supra*, called on behalf of the insurance company testified as follows at page 439: Pac.

“Referring to my notes, his complaint showed evidence of soreness of about ten days’ duration, the principal complaint being pain and tenderness in the right lower quadrant of the abdomen. His complaint was of pain and tenderness around the appendix the previous ten days. There was no history of any previous attacks, and the notes would indicate that it was of a mild nature. My diagnosis to him was a mild acute attack of appendicitis . . . advised operation.”

The Court further stated:

“What Houston’s version was of his consultation of Dr. Beeson, or what was his view of the extent—a temporary ailment or serious disease—of the affliction he may have had at the time of the consultation, we do not know. Houston was dead, hence could not testify. There was testimony, however, that at the time of his application for reinstatement of the policy and up to the time of the reinstatement of the policy, he was in general good health. There is no other evidence of the condition of Houston’s health or of his con-

sulting any physician prior to the reinstatement of the policy, other than as he stated in his application, that on April 1, 1927, he was afflicted "with grippe," and Dr. Ellis made one call.

Clearly then, the question whether Houston made the statement in his application falsely and with intent to deceive the company, was one of fact for the jury. Though his statement was false, it was essential to the defense interposed by the appellant that Houston's answer was made with intent to deceive.

Under our statute (Rem. Com. Stat., 7078), the beneficiary's right of recovery upon the policy can not be defeated, though the representations were false, unless it is further found that the representations were made with intent to deceive. *Houston vs. New York Life Insurance Company*, 159 Wash. 162, 292 Pac. 445.

The court correctly instructed the jury that no misrepresentations in the negotiation of the insurance contract by the assured shall be deemed material or shall avoid the policy, unless the misrepresentations were made with intent to deceive. The questions as to the falsity of the answers and whether they were made with intent to deceive, being questions of fact, are foreclosed by the verdict of the jury.

In the Houston case, *supra*, the Court gave certain instructions to the jury which were much more favorable to the insured than was the case herein presented. You will also find in the Houston case references to many other cases involving the very problem presented herein, and which substantiate the decision in the Houston case and the decision in this case.

The facts of the Houston case and the case here on appeal are peculiarly identical. The Court, in the Houston case, in conclusion, stated at page 443 Pac.:

“It cannot be held, as a matter of law, that though the answers of Houston were untrue and the applicant knew them to be untrue he intended to deceive the appellant when making such untrue representations. Under our statute, whether the misrepresentation was material and also whether it was made with intent to deceive, were questions for the jury. Those questions, under proper instructions, were by the jury resolved in favor of the respondent.”

The primary question presented to the jury was: “Did the deceased make false statements in his application for insurance with intent to deceive the company?”

Rem. Rev. St. of the State of Washington, Section 7078, provides:

“No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with intent to deceive.

The question on appeal is: “Shall the court as a matter of law find the deceased made material false statements with intent to deceive the company and set

aside the verdict of the jury on this alleged question of fact?"

The case of *Houston vs. New York Life Insurance Co.*, *supra*, has not been overruled by any decisions of the State of Washington. This fact was recognized by the trial judge in his memorandum decision (R 425, 426), wherein the Court said:

"I am not convinced from these later decisions succeeding the Houston case and the Logan case, that in an action of this type there has been any deviation by the Supreme Court of the State of Washington from the rule announced in the Houston case."

The appellant has quoted several cases decided by the Supreme Court of the State of Washington subsequent to the decision in the case of *Houston vs. New York Life Insurance Co.*, *supra*, to indicate that the law of the State of Washington is now different than that set forth in the case of *Houston vs. New York Life Insurance Co.*, *supra*. For these reasons we will review these cases presented by the appellant.

In the case of *McCann vs. Reeder*, 178 Wash. 126, 34 Pac. 2nd 461, the Supreme Court recognized the rule established in the case of *Houston vs. New York Life Insurance Company*, *supra*, as the law in the State. In that case the defendant secured a policy of insurance upon certain automobiles being operated by

the defendant. In making application for the insurance the insured in response to questions asked, answered that during the past three years he has had no accident as a result of ownership or operation of any auto-vehicle, and no company has refused him insurance on any auto-vehicle. The facts disclosed that during the previous three years the insured had six accidents involving automobiles or trucks either owned or operated by the insured, one of which was being driven by the insured at the time of the accident. The insured also admitted that he had a number of other minor accidents in addition to the six established under the evidence. The evidence also established that following one of the accidents the insurance company handling his insurance had cancelled his policy for unsatisfactory loss record and accident frequency. Under these facts, the court deemed that it should find as a matter of law that the false statements made in the application were made with intent to deceive. The court, however, as I have stated, above, recognized the case of *Houston vs. New York Life Insurance Co.*, supra, as the law in this State and a case in which the evidence was not sufficient to warrant the court in holding as a matter of law that the deceased had made false statements with intent to deceive.

In the case of *Perry vs. Continental Inc. Co.*, 178 Wash. 24, 33 Pac. 2nd 661, the court in no way modi-

fied or repealed the decision in the case of *Houston vs. New York Life Insurance Company*, supra. In that case the insured had secured insurance on a home, and had in the application for insurance declared that she had never suffered a fire loss. The facts, however, established in the trial of the case were that the insured had sustained a fire loss and that a dwelling belonging to her had been destroyed by fire and that she had collected the sum of \$4500.00 thereon. Under these facts the court held as a matter of law that the statements made by the insured were made with intent to deceive. In both of the cases it will be noted that the insured had the opportunity of being present in court to defend against any statements made by the company. Whereas, in this case the insured is dead and there is some difficulty in presenting his version of the case.

In the case of *Great Northern Life Insurance Co. vs. Johnson*, 187 Wash. 347, 60 Pac. 2nd 109, the court again recognized the rule established in the case of *Houston vs. New York Life Insurance Co.* supra. In this case the deceased had made application for insurance on her life and had in response to several questions answered in substance that she had never had any disorders of the heart; that she had not had goiter trouble; that she had not lost weight, and had not consulted a physician during the past seven years. The facts established in the case were that she had consult-

ed a physician during the past three years concerning a goiter and had informed this physician that she had been under treatment for goiter for a period of four years; that she also complained of nervousness, tired feeling, attacks of palpitation of the heart, shortness of breath, constipation, and stomach discomfort, slept poorly and had dizziness; that she further had an infected tonsil or piece of tonsil and had the same removed within one year of the date of the application; that she had continued to be treated for goiter and had lost approximately eleven pounds of weight during this treatment; that she also had an exophthalmos, more mark on the right side than on the left; that is, bulging of the eyes; that she also had a definite tremor of the hand characteristic in thyroid cases, and that she was given medicine during a period of approximately eight months while under treatment prior to the application for insurance. On this set of facts, the court held for the company notwithstanding the verdict of the jury.

There have been no other subsequent cases decided by the Supreme Court of the State of Washington concerning the point herein involved and it is our contention as it was the trial judge's contention that the case of *Houston vs. New York Life Insurance Co.* supra, is controlling as to the law of the State of Washington on the point involved herein.

In the present case, the only evidence of any substance is that the deceased visited the family physician and upon examination was found to be in the best of health, except that slight pain of the stomach was elicited upon deep pressure. The evidence is not clear as to the extent or nature of the examination given by the physician. It is evident, however, that the deceased's physician found the deceased to be in the best of health and that there were no indications of any suffering or of any disease when the examinations were made of the deceased.

It will also further be noted that the company's examining physician on the 18th day of September, 1945 found from his manual examination, no growths within the stomach cavity, no tenderness, no temperature, normal pulse, normal blood pressure, normal weight, good color and all other indications of general good health, including the favorable returns of the urinalysis.

In light of these facts, it is our opinion that under the decisions of the Supreme Court of the State of Washington, that a question of fact is presented as to whether or not the deceased made false statements as to material facts with intent to deceive the insurance Company. This certainly, in line with the decisions of the Supreme Court of the State of Washing-

ton, is not such a case as would warrant the Court from finding, as a matter of law, that the deceased made such statements with intent to deceive.

II

Good health, a representation or condition

The appellees maintain that the existence of good health on the part of the deceased under the terms of the policy, was not a condition precedent to its existence. The section of the application in question (R 146, 405) provides:

“It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is manually delivered to and received by the applicant in person and the first premium thereon paid in full during his lifetime and good health, and then only if the applicant has not consulted or been treated by any physician, or changed his occupation, since his medical or non-medical examination; *provided, however, that if the applicant at the time of making this application pays the agent in actual cash the full amount of the first premium for the insurance applied for in Question 7, 8, 9, and 10, and so declared in this application and received from the agent a receipt therefor on the receipt form which is attached hereto and if the Company, after its usual examination and investigation, shall be satisfied that the applicant was, at the time of completion of this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan with the Additional benefits and with the Accident and Health Insurance and for the amounts applied for in Questions*

7, 8, 9 and 10 at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force, under and subject to the provisions of the policies applied for, from and after the date of medical examination, or of the non-medical examination therefor, in accordance with the rules of the Company, whether the policies be delivered to and received by the applicant or not." (Italics ours)

The second provision as underscored provides that the policy shall take effect from and after the taking of the physical examination if the insured shall upon making of the application, pay the first premium and answer certain questions therein asked. The requirement of delivery in good health is not required as it is specifically stated that the policy shall take effect whether delivered and received by the applicant or not.

In the case before this court, the deceased had made application, payed the first premium prior to the physical examination (R 204, 205, 206, 207). Therefore the policy took effect as of the date of the physical examination and was in force whether or not there was delivery of the policy:

In the case of *Logan vs. New York Life Insurance Company*, 107 Wash. 253, 181 Pac. 906, you will note that the policy therein issued was issued with a provision that such should not take effect until the first premium was paid and the policy delivered to and received by the applicant during the applicant's lifetime

and good health. This was a specific condition of the policy. The facts were that following the application, and prior to the delivery of the policy, the applicant had known serious illness from which he later died.

The Court stated at page 909 Pac.:

“There were three conditions here which were made precedent to the contract becoming effective; first, the payment of the premium; second, the delivery of the policy; and third, the delivery during the lifetime and good health of the insured. All of these conditions must concur before the contract of insurance became effective. If the payment of the premium is a condition precedent, the delivery of the policy during good health is likewise a condition precedent.”

It is true that if, good health, were a condition precedent to the policy taking effect, then the question of misrepresentation would not be an issue in this case, as presented to us under Rem. Rev. Statutes of Washington 7078. A careful reading of the provisions of the application will show that under the facts in this case good health was not a condition precedent to the enforcement of the policy.

In the case of *Fraser vs. Metropolitan Life Insurance Co.*, 165 Wash. 677, 5 Pac. 2nd, 978, the court found that the policy contained a provision which provided that the policy did not take effect unless the insured was in good health at the time of its delivery. In this case the Supreme Court of the State of Washington

again followed the decision in *Logan vs. New York Life Insurance Company*, *supra*. The Court therein stated, in referring to the case of *Logan vs. New York Life Insurance Company*, *supra*, at page 908 Pac.:

“The rule therein stated is applicable in the present case because of the breach of the condition of the policy, in that the insured was not in good health at the time it was delivered. . . .”

The case of *Guarascio vs. Prudential Insurance Company*, 110 Wash. 1, 187 Pac. 405, involves the same question as *Logan vs. New York Life Insurance Co.* *supra*. For in that case the application among other things, stated at page 405 Pac.:

“Said policy shall not take effect until the same shall be issued and delivered by said Company and the first premium paid in full, while any health habits and occupation are the same as described in the application.”

The facts were that the insured was healthy at the time his application was made, but became ill with tuberculosis between the time of the application and delivery of the policy, and died within a day of the delivery of the policy. The condition set forth above, being a condition precedent to the effective date of the contract, the Court held the policy not to have taken effect.

The provision of the application heretofore set forth clearly provides and sets out two methods which may be

followed by the applicant in applying for his policy of insurance. The first method provides that he may make the application and take the physical examination without making the payment of the premium at such time. In such event the policy, according to the terms of the application, shall not take effect until the payment of the first premium thereon and manual delivery is made to the applicant during his lifetime and good health.

The second method of application provided for allows the applicant to pay the first premium in full at the time of the making of the application and prior to the physical examination. In such event the policy, according to the terms of the application, shall take effect from and after the date of the medical examination whether the policy be delivered to or received by the applicant or not.

The two provisions of the application are distinct in themselves and are separated by the words, "Provided, however, that if . . . " Webster's New Intercollegiate Dictionary defines the word "however" as follows:

"Nevertheless, notwithstanding, yet, still, though."

Certainly the use of the word "however" directs your attention to the fact that there are two distinct methods that the applicant may follow in his application for insurance and that under the two methods

the policies shall take effect under different terms and conditions.

It must be remembered that this policy was written by the company and the terms and conditions thereof, and the interpretation thereof, must be most strongly interpreted in favor of the insured and against the company who wrote and presented this contract. As written, it is clear that under the evidence and the facts in this case, the second provision of this application is the only provision applicable herein. We therefore maintain that the provisions of the application preceding the words "Provided, however," do not apply in this case as to the effective date of the policy or as to conditions therein contained.

The sole question presented by the question of good health is as set forth in question No. 17 (R 153) wherein the applicant was apparently asked by the examining physician the following questions:

"Are you now in good health as far as you know and believe? A. Yes."

This statement is a representation; Rem. Rev. Statutes of Washington 7078, provides:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such

misrepresentation or warranty is made with the intent to deceive. If any breach of a warranty or condition in any contract or policy of insurance shall occur prior to a loss under such policy, such breach shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of such loss under such contract or policy."

The jury further was submitted under interrogatory No. 2 this question:

"A. Did Alfred Vaughn know that he was not in good health when he signed the application on September 18, 1945?

Answer. No." (R 75).

III.

Were the issues tendered by the pleadings properly submitted to the jury?

On the 18th day of September, 1945, at the solicitation of Guy Hubbard, agent for the company the deceased made application for an insurance policy on his life. The insured died on November 19, 1945, and in due time proof of death was submitted to the company. The policy issued by the company and in the hands of the beneficiaries, the surviving wife and minor children, specifically provided in large print in a conspicuous place that:

"Important—The Company should be notified at once of the death of the insured. It is not neces-

sary to employ any person to collect the benefits due under the policy. Save time and expense by communicating direct with the Company."

An examination of the evidence and the pleadings will indicate that the company did not give any notice that the provision of the policy as above set forth was to be disregarded; however, it did, on the 30th day of January, 1946 less than two and one-half months after the death of the deceased bring action to rescind the policy and at the same time to enjoin the beneficiaries from bringing action on the policy.

Is the court of equity to be used as a sword? Is not the remedy in equity exceptional and the outcome of necessity?

The company maintains that they, being the first into court, have the right to have the case decided completely in equity. It is the rule, however, that fraud in such cases is an adequate defense to a legal action on the policy. *American Life Insurance Co. vs. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605. *Ettelson vs. Metropolitan Life Insurance Company*, 137 Fed. 2nd, 62.

Are the beneficiaries to be penalized and prohibited from presenting their case to the jury because they were not wise enough to see through the statement on the policy and immediately flee to the court of law with their action?

A fundamental rule of equity is that one seeking equity must do equity. Under the pleadings, the facts and the policy, we maintain that the company has done nothing that should entitle it to demand the extraordinary remedy afforded by the court of equity.

Certainly speed in commencing a law suit, unless there be unnecessary delay, should not be the determining factor in determining the right of trial by jury. Likewise, as stated in *Pacific Indemnity Co. vs. McDonald*, 25 Fed. Supp. 522:

“It would be a strange situation if a litigant’s constitutional guaranties, good when the litigant was plaintiff, were not good as to the identical issues when the litigant was a defendant.”

The substantive law of the land is that fraud in the procurement of an insurance policy is provable as a defense in an action on a policy. United States Supreme Court in *American Life Insurance Co. vs. Stewart*, *Supra*.

The Supreme Court of the State of Washington also enunciated the same rule in *Houston vs. New York Life Insurance Co.*, *supra*; that fraud in the procurement of an insurance policy was an adequate defense in an action at law on the policy.

We maintain that the federal courts are to be governed by the substantive law of the State in which the

case arises. This being so the company has an adequate remedy in a suit at law, and the lower court was correct in granting to the defendant the right of trial by jury in which hearing the company presented its defense, and if established would be a complete and adequate defense to the action on the policy by the beneficiaries.

The latest decision of the highest federal tribunal involving the issue on appeal was handed down by Justice Cardoza in *American Life Insurance Co. vs. Stewart, supra*. In this case two policies of life insurance were issued by the company on the life of the insured. The insured died three months after the policies were issued and three months later the company commenced an action to cancel the insurance policies on the ground of fraud. The beneficiaries then, about a month and a half later, commenced action in the same court on the policies. The insurer asked for an injunction against the continued prosecution of the actions in law. Also a motion to dismiss was interposed. The motion to dismiss was denied but the motion for injunction was not passed on. The beneficiaries then stipulated that the equity action might be tried first.

The court held that in view of the incontestability clause that the beneficiaries might not bring their action and that the defense afforded to the insurer might

be lost and that equity was available in such situations. The court at page 215, however, stated:

“There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. *Landis vs. North American Co.*, December 7, 1936, 299 U. S. 248, ante, 153, 57 S. Ct. 163. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. Ibid. If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. Cf. *Harnischfeger Sales Corp. vs. National L. Ins. Co.* (C. C. A. 7th) 72 F. (2d) 921, 922, 923. There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate, or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained. *Landis vs. North American Co.*, *supra*. But respondents, as already indicated, gave that possibility away. They stipulated that the issues in equity should be tried, in advance of those at law, and that only such issues, if any, as were left should be disposed of later on.”

The district court in our case was in the position of the district court as described in the above case except that the defendants had not waived their rights by

any stipulation. The court, then, in line with the above decision, had the right to control its own docket, and exercise its sound discretion in holding the action in equity in abeyance pending the action at law. The court also had the right to consider the equities; that is, determine if the plaintiff was precipitate or the defendant dilatory as well as other factors, including the statement on the policy that the beneficiaries need not employ anyone to assist them to collect the policy.

We maintain that the court was justified in pursuing the course it followed under the circumstances of this case. Certainly it cannot be said that there was an abuse of discretion on the part of the trial court that should warrant reversal.

The point in question was also raised in the case of *Enelow vs. New York Life Insurance Company*, 293 U. S. 379, 79 L. Ed., 440. In this case, according to the decision as written by Chief Justice Hughes, a policy of insurance was issued on the life of the deceased in December 1931, which policy provided that it should become incontestible after two years from date of issue. The deceased died in May 1933 and an action in State court was brought by the beneficiaries in July 1933 and removed to Federal Court.

The insurer set up as an affirmative defense the facts involving false and fraudulent statements in the

application for the policy. The insurer then petitioned the court asking that the equitable issues be heard prior to the action at law, which petition was denied. The court, in its decision, held that the District Courts do have the inherent power to control the progress of causes being presented to them and may stay a case in equity or in law.

As to the merits of the case, the court stated, at page 383:

“Second. We come to the merits. Was the defense set up by the defendant of such a nature that defendant was entitled to have it heard and determined in equity and to enjoin the proceedings at law pending that determination? The test under Section 274b is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged. The defendant’s rights to a hearing in equity are “the same,” not greater, when he resorts to the summary procedure. . . . And it necessarily follows that this summary procedure cannot aid the defendant when a bill for the same relief would not lie because the defense is one which is completely available in the action at law. Emphasizing the fundamental principle of the equitable jurisdiction, the Congress, from the first Judiciary Act, has declared that suits in equity shall not be sustained in any court of the United States in any case where a “plain, adequate and complete remedy” may be had at law. . . .

The instant case is not one in which there is re-

sort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable. Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant "with knowledge of this falsity and fraudulently" in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. . . . "

In the case on appeal the action on the cross complaint and demand for jury had been filed. The period of incontestability ran until September 19, 1947. Certainly there was no eminent danger in July, 1946, the date of trial, that the period of incontestability was about to expire, and certainly this could not be said to exist on January 30, 1946, the date of the filing of the plaintiff's complaint.

A recent case decided since the date that the Federal Rules of Civil Procedure took effect is *Ettelson vs. Metropolitan Life Insurance Company*, 137 Fed. 2nd, 62. In this case the insured was insured in four policies of life insurance issued by the defendant. The insured died in July, 1939, and action was commenced upon the policies by the beneficiaries in November, 1939, in the State Court of New Jersey. The case was then removed to the U. S. District Court and the defendant filed an answer and counter-claim asking for cancellation and rescission of the policies because of alleged fraud of the insured. The plaintiff filed demand for jury trial and moved to dismiss the defendant's counter-claim on the grounds that the defendant had an adequate remedy at law. The District Judge denied the motion and stayed the prosecution of the plaintiff's case until after the issues raised by the counter-claim had been determined in equity. From this order the plaintiff appealed.

The court stated, at page 63:

"The sole question concerned in the appeal is the correctness of the order refusing to dismiss the counter-claim for cancellation and the staying of the suit on the policy until the issues raised by the counter-claim were decided. We think that order was incorrect and that the trial judge was in error in making it."

The court stated further, at page 65:

“(4) Having concluded that the rule of *Erie R. Co. vs. Tompkins* does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim tried by the court, as though the judge was sitting in equity, before the present rules, or whether the plaintiffs are entitled to have the issue tried by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of “equitable” fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant’s contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of *Erie R. Co. vs. Tompkins*, but because that is the federal court law on the subject.

(5) We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, “fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available.” *American Life Ins. Co. vs. Stewart*, 1937, 300 U. S. 203, 212, 57 S. Ct. 377, 379, 81 L. Ed. 605. 111 A.L.R. 1268, citing *Enelow vs. New York Life Ins. Co.*, 1935, 293 U. S. 379,

385, 55 S. Ct. 310, 79 L. Ed. 440; *Adamos vs. New York Life Ins. Co.*, 1935, 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Insurance Co. v. Bailey*, 1872, 13 Wall. 616, 20 L. Ed. 501; *Cable vs. United States Life Ins. Co.*, 1903, 191 U.S. 288, 306, 24 S. Ct. 74, 48 L. Ed. 188

(6, 7) In none of these decisions, however, is the distinction between "legal" and "equitable fraud" expressly drawn. The defendant has urged that the cases involved "legal fraud" and the rule laid down applied only in such instances. With this contention we do not agree. We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent mis-statement or nondisclosure has been tried by a jury in an action at law on the policy. Three of the decisions to this effect were written by no less an eminent authority on equity jurisprudence than Justice Story. *McLanahan v. The Universal Insurance Company*, 1825, 1 Pet. 170, 185 7 L. Ed. 98; *Carpenter v. American Ins. Co.*, C. C. D. R. I., 1839, 5 Fed. Cas. page 195, No. 2, 428; *Hazard v. New England Marine Ins. Co.*, C.C.D. Mass., 1832, 11 Fed. Cas. page 937, No. 6, 282, reversed on other grounds, 1834, 8 Pet. 557, 8 L. Ed. 1043, but expressly affirming the point involved here, 8 Pet. at page 583, 8 L. Ed. 1043. See also *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. of New York*, 2 Cir., 1902, 115 F. 77, affirmed on rehearing, 2 Cir. 1903 124 F. 25, certiorari denied, 1904, 192 U. S. 605, 24 S. Ct. 849, 48 L. Ed. 585.

Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective "legal" or "equitable." The issue on such a defense was tried by

a jury prior to the present rules; it continues to be so triable since."

Another decision involving the point at issue rendered since the effective date of the Federal Rules of Civil Procedure is *Beaunit Mills Inc. vs. Eday Fabric Sales Corp.* 124, *Federal* 2nd, 563. In this case the plaintiff brought an action against the defendant for judgment, declaring a certain patent to be invalid, and for injunctive relief. The defendant filed a counter-claim declaring the patent valid and infringed and claimed damages. The only issue actually appealed was the annulment of the defendant's demand for jury. The court felt that there was no appealable order. However, in line with the question of right of trial by jury, under the new rules, the Court stated on page 565:

(2-5) "This very case affords illustration of the practical advantages of discouraging such interlocutory appeals on matters which may well be moot after real adjudication is had. It is true that on issues of patent infringement a jury trial may be had under a claim for damages only, 35 U.S.C.A. 67, as distinguished from a claim for injunction and accounting of profits. 35 U.S.C.A. 70. Here, however, considering the complaint alone, it is framed along equitable lines looking to injunctive relief, both prohibitory and mandatory in character, as well as an accounting, together with declaratory relief substantially as incidental thereto. This appears to stamp it as presenting equitable issues only, *Bellavance vs. Plastic-Craft*

Novelty Co., D. C. Mass., 30 F. Supp. 37, 39; and hence when the district judge acted, he was correct in denying jury trial. But this does not necessarily mean that a jury issue may not later develop. *The appellee simply relies on the old discarded division when it asserts that a case begun as an "equity" suit remains as such, so that all rights of jury trial are thereafter waived by all the parties. But there are no longer equity cases and law cases, and it is the issues, not the form of case, which now determine the method of trial.* Federal Rules 38 (b) and (c), 39 (b); Pike and Fischer, loc. cit.; 3 Moore's Federal Practice 3004-3021, 3029, 3030.

(6) It may be that the issues tendered by plaintiff herein will be entirely decisive of all disputes, under the doctrine of *Leach vs. Ross Heater & Mfg. Co.*, 2 Cir., 104 F. 2d 88. If, however, issues of a legal nature are later developed, the question of jury trial will have to be determined in the light of the then status of the case. Compare *Eastman Kodak Co. vs. McAuley*, D.C.S.D.N.Y., 2F R. D. 21; *Great Northern Life Ins. Co. vs. Vince*, 6 Cir., 118 F. 2d 232, 234. Professor Moore argues persuasively that when "the basic issue" is one which historically was for the jury, a jury demand should be respected, without regard to the party who had first made the claim; or, in other words, that the substance of the action as finally developed should control, not the circumstance of who first commenced it. 3 Moore's Federal Practice 3015, 316. Compare discussion by Pike and Fischer, supra, 88 U. of Ja. L. Rev. at pages 653, 654; *Pacific Indemnity Co. vs. McDonald*, 9 Cir. 107 F. 2d 446, 131 A.L.R. 208; 35 Ill. L. Rev. 339; 13 So. Calif. L. Rev. 170.

The laws of the State of Washington provide for a

system of code pleadings which is somewhat similar to the rules of pleadings under the Federal Rules of Civil Procedure. Under the laws of the State of Washington there is but one action, and that is a civil action, as is similar under the Federal Rules of Civil Procedure. Under this system of pleadings the Supreme Court of the State of Washington, in 151 Wash. 561, 276 Pac. 863, *Millet vs. Pacific Cider and Vinegar Company*, held at page 863 Pac:

“While it seems plain, looking alone to the allegations of the complaint, that the action would have to be viewed as a pure law action, yet whether it should be viewed as a law action, triable by a jury, or viewed as a suit in equity, triable by the court, is under our code system, determinable by reference to all of the issues raised by all of the pleadings and not by reference to the allegations of the complaint alone.”

IV.

Did the District court err in giving appellees proposed Instruction No. 10?

The appellant objected to instruction No. 10 and particularly to the word “convinced” on the grounds and for the reason that the same placed an undue burden upon the appellant.

Webster’s Encyclopedic Dictionary, 1941 edition, defines the word “convince” as:

“To persuade or satisfy by evidence.”

It is our contention that "convinced" was the proper word to use in this instruction and carried with it the same thought as the words "unless you believe." It is further our contention that it was the proper word to be used in line with the definition as set forth in the dictionary above described.

CONCLUSION

Under the facts and circumstances of this case, and in line with the Statutes and decisions of the State of Washington, a question of fact as to intent to deceive existed which was properly presented to the jury.

Good health under the terms of the policy, as written by the appellant, was not a condition precedent to the policy's existence.

The substantive law of the State of Washington and the Federal Court is that fraud is an adequate defense in a suit on the policy. The court did not abuse its discretion in presenting the issues formed by all the pleadings to the jury. We therefore submit that the judgment of the lower court should be approved.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA WESTERN STATES LIFE INSURANCE
COMPANY, a corporation, *Appellant,*

vs.

CAROLYN H. VAUGHN, a widow and JOHN ALFRED
VAUGHN, and JOAN MARILYN, VAUGHN, by their
guardian ad litem, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF OF APPELLANTS

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JOE S. PEARSON,
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FILED

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UNITED STATES
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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA WESTERN STATES LIFE
INSURANCE COMPANY, a corporation,
Appellant,

vs.

CAROLYN H. VAUGHN, a widow and JOHN
ALFRED VAUGHN, and JOAN MARILYN,
VAUGHN, by their guardian ad litem,
Appellees.

No. 11500

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

REPLY BRIEF OF APPELLANTS

INTRODUCTION

Appellant's opening brief presents the following major points which are supported by the arguments and citations therein set forth:

- I. Under the evidence, was not Vaughn guilty of fraud as a matter of law?
- II. Was the existence of good health on Vaughn's part, on and after August 23, 1945, a condition precedent to a binding contract under the policy provisions (Pltf's. Ex. 1b, R. 155).

III. Were the issues tendered by appellant's second amended complaint and appellees' second amended answer properly submitted to the jury?

Appellee seeks to answer these points in her brief and this reply brief is, accordingly, directed to the discussion by appellee of the points listed above.

Certain statements by appellee in her "Statement of the Case" are discussed in the light of the actual record under point I above.

Appellee's argument respecting the propriety of appellant instituting this action is met under point III above.

I.

Under the undisputed evidence, the deceased was guilty of fraud as a matter of law.

Certain of the statements made by appellee's counsel in his brief require re-examination in the light of the record.

He points to the difficulty experienced by appellant's representative in selling the policy (p. 1 of brief). Here are the facts. The company's salesman, W. Guy Hubbard, had called on Vaughn for ten years. Vaughn had never seemed interested before (R. 178). On the occasion of the last call he was seen for an hour and a half or two hours (R. 179).

Hubbard testified on cross-examination (R. 182):

"Q. Did you have some difficulty in persuading him to purchase the policy?

A. No, not particularly. I don't think so. It was just a matter—

Q. Why was the—

MR. KAHIN: Just a moment.

THE COURT: You interrupted him. He didn't finish the answer.

MR. COOPER: I beg your pardon.

THE COURT: Finish your answer.

THE WITNESS: It was more a matter of explanation rather than convincing the man that he wanted it. I think he agreed that he would buy some, but it was the time that it takes for the description of the policy."

Supporting these statements, Mr. Henry Damski, the company's manager for Western Washington testified as follows (R. 277, 295)

"Q. Did he tell you whether or not it had been difficult to get the application or not? Answer that 'Yes' or 'No'?

A. Yes.

Q. He did tell you that? I mean, he did discuss that with you?

A. Yes.

Q. By Mr. Kahin: Mr. Damski, you say there was a telephone conversation regarding this case?

A. The usual routine. When any of our policy holders pass away, the agent calls me or tells me, and I wire the home office. That's all there was to that.

Q. That was all?

A. Yes, that is the first time I heard of the *Vaughn* case.

Q. Now, I am alluding to a conversation pertaining to the selling of this policy?

A. Yes, sir.

Q. As to whether or not it was difficult to get the application, if Mr. Hubbard made any such statements to you, and I am asking you to relate exactly what they are, as nearly as you can remember.

A. I remember them very definitely.

Q. Will you relate them?

A. Mr. Hubbard told me that he had tried to sell Mr. Vaughn at least once a year for many years, I think he mentioned ten years, and he never could write him the insurance policy, but Mr. Hubbard said that this evening he was very easy to write, and if you will allow me to use the vernacular of insurance men, I will quote exactly what Mr. Hubbard said, your Honor, and that was—

MR. COOPER: Just a moment. I object as not responsive to the question.

THE WITNESS: I am going to say exactly what Mr. Hubbard told me.

THE COURT: You had better ask another question. I am not answering the witness.

Q. By Mr. Kahin: Exactly what did Mr. Hubbard tell you?

A. He said, 'He was a push-over that night'."

One other factor bears importantly upon the deceased's desire to secure coverage at this particular time. He paid cold cash for the first premium— *and well he might knowing that at the very moment he must prepare for a major operation.*

In appellee's statement (p. 2 of brief), the *apparent* good health of the deceased is stressed, presumably as an argument attesting to his good faith in signing the application.

If Vaughn was not suffering pain, why did he consult Dr. Durant on four different occasions? If there was nothing wrong with him why did Dr. Durant advise surgery?

The answers to these questions determine Vaughn's state of mind when he gave false answers to Dr. Tuohy. *He knowingly and intentionally withheld facts known only to him which had he disclosed would have made him uninsurable at that time.*

Dr. Durant himself settles the matter of Vaughn's own appreciation of his condition when he states (concerning the September 18th examination): "As I recollect, he was conscious there was something the matter."

Obviously ignoring Vaughn's visit to Dr. Durant on September 18th, appellee's counsel dwells at length on Dr. Tuohy's examination (page 3 and 4 of brief), stating that: "Even though he would have known that the deceased had consulted Dr. Durant, and knew what Dr. Durant knew, that he would have passed the deceased as an insurable risk."

The record does not bear out this statement. In the first place it was not Dr. Tuohy's job to accept or reject the applicant. This function was lodged entirely with the company (R. 188). Secondly, had Dr. Tuohy been given the information which Vaughn withheld, he testified he "would have put on the paper the history

of that. I would have passed him, and left that up to the company as to whether or not to pass him or not" (R. 143).

The reason he did not put it down was because Vaughn failed to disclose it to him (R. 144). Had such a state of facts been furnished to appellant, it would not have accepted the application (R.192).

Vaughn completely disregarded the truth when he answered: "he was never sick" for one cannot truthfully say he was never sick who had so recently consulted a doctor three or four times due to repeated attacks of what he believed to be appendicitus. Certainly a person suffering recurring attacks of pain in the abdomen or discomforts in that area can hardly be said to be well. That is the reason he consulted Dr. Durant. *It was the motivating reason for his application for a policy of insurance on September 18th.*

As he did at the trial of this cause in the District Court, appellee's counsel grounds his entire case on *Houston v. New York Life Insurance Company*, 166 Wash. 611, 8 P.(2d) 434. Under counsel's interpretation of this case there could be no such thing as fraud as a matter of law.

Obviously, the *Houston* case does not, nor could it, lay down such a ruling. In that case, the Washington court held the question under *those facts* to be one for the jury. That is the limit of the decision as counsel for appellee himself recognizes at page 12 of his brief, where he states that in the *Houston* case the evidence was not sufficient to warrant the court in holding as a matter of law that the deceased had made false statements with intent to deceive.

Both earlier and later Washington cases recognize however, that where the facts of dishonesty are such that reasonable minds cannot differ the question is to be decided by the court as a matter of law. These cases which appellee vainly seeks to distinguish from the facts in the present case are cited in appellant's opening brief.

We earnestly submit that the facts in this case justify and make mandatory the application of the rule. We believe a brief review of the facts will show this and at the same time distinguish Vaughn's situation from the one which confronted the Washington court in the *Houston* case (*supra*).

Vaughn had consulted a doctor, not once and over a short period of ten days, but on four occasions over a period of five months. In each instance he made the same complaint, received the same diagnosis and was advised that surgery was necessary. Further, and this fact is not present in the *Houston* case, Vaughn was given a choice of two doctors to make the examination for life insurance—his family physician who knew all about him and a stranger who could know only what Vaughn saw fit to tell him. *He chose the latter.*

He was asked certain questions concerning his health and in answers stated: (a) that he was in good health; (b) that he had not consulted a physician within five years; (c) that he had never been advised to have any surgical operation; (d) that he had never had any stomach disease or injury (Appellant's Exhibit 1a, R. 141, 142).

We submit that there is a point beyond which the statute here contended for (Rem. Rev. Stat., Sec. 7078—Appellee's brief, p. 10) cannot be stretched. The Washington court states the law unequivocally in *McCann v. Reeder*, 178 Wash. 126, 34 P.(2d) 461:

"We now come to the main question. Rem. Rev. Stat., Sec. 7078, insofar as it is material here, reads as follows:

" 'No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive.'

"Under our decisions construing this statute, the beneficiary's right to recover upon the policy is not defeated or avoided merely because the representations are false. It must also be found that they were made with intent to deceive. *Houston v. New York Life Ins. Co.*, 159 Wash. 162, 292 Pac. 445, and cases therein cited. The effect of the rule as prescribed by the statute is that the intent of the one making the misrepresentation or warranty is ordinarily a question of fact. If there be a conflict in the evidence touching that question, it is to be resolved by the trier of the fact; *if, however, there be no conflict in the evidence, or if, from the evidence, only one conclusion can properly be reached, it must be determined as a matter of law.*

"Applying this rule to the present case, we are of the opinion that the evidence here presents no conflict, and that the question of intent is to be determined as a matter of law. * * *" (Italics ours)

Appellee makes the point (p. 13 of brief) that since the assured is not present to testify there is, in effect, some kind of a presumption as to his not intending to deceive appellant. This is not correct under the Washington cases which state the rule as follows:

“The proof of the making of false and fraudulent representations raises a presumption of dishonest motive, which must be overcome by evidence establishing an honest motive.” *Day v. St. Paul Fire and Marine Insurance Co.*, 111 Wash. 49, 189 Pac. 95, as quoted in *Great Northern Life Insurance Company v. Johnson*, 187 Wash. 347, 60 P.(2d) 109.

See, also: *Equitable Life Insurance Company v. Carver*, 17 F. Supp. 23 (D.C.W.D.W., 1936); *Quinn v. Mutual Life Insurance Company*, 91 Wash. 543, 158 Pac. 82.

Further, the rule should not be so far extended as to include a case where insurance would not be procurable if the truth were told. *Great Northern Life Insurance Company v. Johnson* (*supra*).

The conclusion is inescapable as to intention to deceive for the evidence is uncontroverted and its extent and force is such as to require a finding of fraud as a matter of law.

II.

Good health was a condition precedent to contract.

Appellant's position is not as appellee's counsel would have the court believe, a matter of the interpretation of the policy provisions (plaintiff's Exhibit

1b) respecting the date when the policy became effective.

It is appellant's contention that this provision, taken from a common sense point of view, is clear and unambiguous, leaving no room for interpretation. Considering the matter from this standpoint, the provision in question says in effect, that if the premium is cash, delivery is not essential to a binding contract. There is no mention in the proviso eliminating good health—delivery is the only condition eliminated from the mutual agreements preceding the proviso clause. One of these mutual agreements is that the assured be in good health when the first premium is paid. Since he was not there was no contract.

According to appellee, a binding contract would exist irrespective of the insured's physical condition. Let us test her position by assuming that Vaughn had made the disclosures which common honesty required. According to the evidence, Dr. Tuohy would have reported these facts to the company. The company would have refused the application.

Appellee's contention, if followed, gives the insurer no chance to avoid a contract on any grounds once a premium is paid. Authorities are not required to demonstrate the unsound basis, morally and contractually, of such a position.

III.

The District Court erred in trying the equitable issues before a jury.

Appellee again makes the point that the question of jury trial is governed by the law of the State of

Washington. This question is completely answered by the cases cited in appellee's own brief and those previously cited in appellant's brief. The question is procedural and governed by the law of the forum, not by the laws of the State of Washington.

Appellee seeks to avoid the impact of the Federal decisions on this point by basing her argument on the fact that appellant saw fit to commence the action within two and one-half months after Vaughn's death.

Mr. Justice Cardozo, speaking for the court in *American Insurance Company v. Stewart*, 300 U.S. 203, 47 S. Ct. 377, 81 L. ed. 605, supplies the answer and reason justifying appellant's action:

"The argument is made, however, that the insurer, even if privileged to sue in equity, should not have gone there quite *so quickly*. Six months and ten days had gone by since the policies were issued. There would be nearly a year and a half more before the bar would become absolute. But *how long* was the insurer to wait before assuming the offensive, and *how was it to know where the beneficiaries would be* if it omitted to strike quickly? Often a family breaks up and changes its abode after the going of its head. The like might happen to this family. To say that the insurer shall keep watch of the coming and going of the survivors is to charge it with a heavy burden. The task would be hard enough if beneficiaries were always honest. The possibility of bad faith, perhaps concealed and hardly provable, accentuates the difficulty * * *." (Italics ours)

Appellee's contention as to the appropriateness of jury trial if stripped of legal verbiage is that she

should not be deprived of a jury trial so far as concerns her cross-complaint.

We submit that such a contention begs the question put by appellant in this appeal.

We have already demonstrated that appellant was within its right in commencing its action. *American Insurance Company v. Stewart* (*supra*). *Enloe v. New York Life Insurance Company*, 293 U.S. 379, 79 L. ed. 440, cited by appellee, is not controlling for the reason that there the incontestability clause did not render action by the insurer necessary in order to protect itself.

The direct question put to this court is whether or not appellant, having commenced an action in equity for cancellation, is to be deprived of a well established remedy, trial of the issues by the court, because a cross-complaint, seeking recovery on the policy, is interposed.

It is our position, supported by what we believe to be the weight of federal decisions, that equitable jurisdiction existing, as it did here at the filing of the bill, is not destroyed because an adequate remedy of law may have become available thereafter. *Lincoln National Life Insurance Company v. Hammer*, 41 F. (2d) 12, 16; *New York Life Insurance Company v. Seymour* (C.C.A. 6) 45 F.(2d) 47; further that equity having once acquired jurisdiction will retain it until complete justice is done between the parties. *American Life Insurance Company v. Stewart* (*supra*); *MacGowen v. Parish*, 237 U.S. 285, 296, 35 S. Ct. 543, 59 L. ed. 955, 963; *Alexander v. Hill-*

man, 296 U.S. 222, 242, 46 S. Ct. 204, 80 L. ed. 192, 201.

In short, we contend that appellant's right to a trial of the equitable issues framed by its complaint and by appellee's answer is just as sacred as appellee's right to a trial by jury. *Brown v. Kalamazoo Circuit Judge*, 42 N.W. 827.

We submit that the District Court erred in requiring appellant to present its case to a jury.

CONCLUSION

We again respectfully submit:

First: The deceased was guilty of fraud as a matter of law and the Circuit Court should set aside the judgment granted to appellee and decree cancellation of the policy.

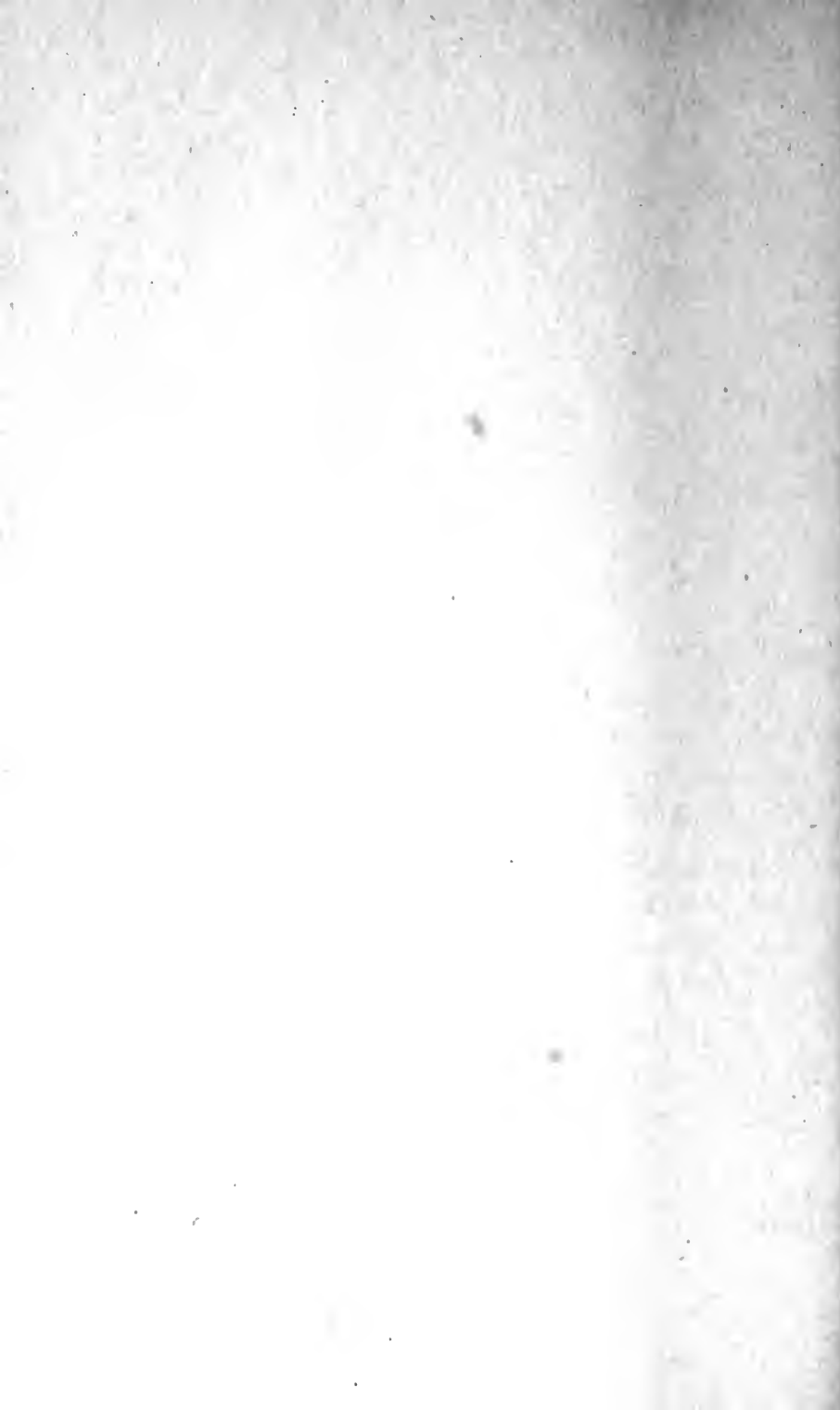
Second: No contract between the parties in fact existed—the ostensible one represented by the policy should be cancelled.

Third: In the alternative, and only in the event the relief above requested is not granted, a new trial should be granted for the reasons stated in appellant's opening brief and herein.

Respectfully submitted,

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Nos. 11506, 11507.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11506.

VICTORIA L. COTTON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 11507.

VIRGINIA CALDWELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

FILED

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Nos. 11506, 11507.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11506.

VICTORIA L. COTTON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 11507.

VIRGINIA CALDWELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

The petitioners, through their counsel, hereby petition the Court for a rehearing in the above-entitled causes.

1. As one ground for a rehearing it is respectfully submitted that the Court failed to pass upon one of the most important questions of law presented to it, and that is whether, in determining the value of income to be realized in the future, consideration must be given to future

income tax burdens. The Court in its opinion stated that it could not say from the record that the statement of The Tax Court, to the effect that it had considered future earnings and all speculative and other factors affecting the price of stocks, was untrue.

The record specifically shows that neither Grimes, Phillips nor Webb gave any consideration to the future burden of income taxes. Webb specifically stated that he had not given consideration to income taxes: "No, my opinion there was before taxes." [R. 452.] Grimes and Phillips stated that they had given consideration only to the 1940 rates [R. 600, 651], which is a definite admission that they did not take into consideration the prospects in existence for future taxes, of which there were many, as disclosed by the record. [See, for example, R. 657-660, particularly the report by Moody on May 5, 1941, "* * * It has been almost universally expected that the normal taxes of corporations would be increased from 24 per cent to 30 per cent * * *," *i. e.*, an increase of 25 per cent. Note that this was one month *prior* to our basic date.]

In view of these clear and unequivocal facts, the statement of The Tax Court that it gave consideration to these matters is not supported by the record but is directly contrary thereto.

What is the practical effect of failure to consider known expected increases in Federal income taxes? The answer, we believe, is obvious, but may be accentuated by the following figures: if a corporation had purchased the oil royalties of Dominguez for \$2,700,000.00 and if the corporation subsequently realized the stipulated estimate of probable royalties in the amount of \$9,000,000.00, its

income taxes, excess profits taxes and franchise taxes on such royalties *at the 1940 rates* would amount to \$2,700,000.00, or roughly 30 per cent of the gross royalties; but the same taxes, *computed on the 1941 rates*, which, as we have seen, were universally expected on our basic date, would aggregate \$3,500,000.00, or 39 per cent of the gross royalty. Thus, the net yield to the corporation on its investment would be reduced by more than one-fifth (from 14.4% to 11.3%) as a result of the foreseeable increase in taxes, a factor certainly to be considered in determining the amount to invest. Since the purchaser of such property would be interested primarily in the future yield, it is manifest that it would have in mind the taxes which would burden that yield, and expected increases in taxes would play an important part in determining how much it could afford to pay for the property. Since a purchaser always takes future taxes into account, we submit that The Tax Court erred in failing to do so.

Grimes had previously published a book in which he stated that the *future* tax burden must be taken into account in any valuation. [R. 655-6.] At an early date, 1926, the Bureau of Internal Revenue laid down the same rule for tax purposes, saying, “* * * That *future* Federal taxes will definitely affect such income and therefore the present earning value of the property cannot be questioned.” (G. C. M. 45, C. B. V-1, 65.) The Supreme Court of the United States had approved this principle: “* * * all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes, or between income taxes and others. * * *” (*Galveston Electric Co. v. Galveston*, 258 U. S. 388, 399, 42

S. Ct. 351, 66 L. Ed. 678. See, also, *State v. Oliver Iron Mining Co.*, 198 Minn. 385, 270 N. W. 609, 619.)

Hence, we submit, a rehearing of these cases is warranted to consider the effect of future income tax burdens upon The Tax Court's valuations.

2. Another ground for this petition is that the only testimony in support of a value of \$900.00 per share for Dominguez stock is the testimony of Grimes, and Grimes refused to adopt "fair market value" as his criterion of value.

This Court states in its opinion that the weight to be given to Grimes' testimony "was a matter for The Tax Court, not this court, to determine;" and that when The Tax Court found a valuation for Dominguez stock higher than the values given by seven expert witnesses and lower only than the value given by Grimes, The Tax Court was merely resolving conflicts in the testimony and determining "the weight to be given to the testimony of each expert."

We respectfully submit that the correct rule of law is that the weight to be given the testimony of an expert witness is not a matter solely for determination by the trial court where it appears unmistakably that such witness used an erroneous standard of value and failed to apply the judicial meaning of "fair market value." We firmly believe it to be within the province of an appellate court—indeed, it is its duty—to say to the lower court, "There is no question about the weight to be given such testimony; it is error of law to consider it at all."

In *Powers v. Commissioner*, 312 U. S. 259, 260, 85 L. Ed. 817, the Supreme Court declared that:

“the question of what criterion should be employed for determining the ‘value’ of the gifts is a question of law. See *Lucas v. Alexander*, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851, 61 A. L. R. 906. Accordingly, the Circuit Court of Appeals was justified in reversing the decision of the Board as ‘not in accordance with law’.”

Grimes was frank in admitting he had failed to consider the factors required to be considered in determining fair market value. He merely valued the assets of the corporation, divided that figure by the number of shares outstanding, and called the resulting figure of \$933.31 “fair market value.” [R. 628, 681-2.] He refused to consider earnings, either past or prospective, and in fact he specifically stated that he could not consider earnings. [R. 629.] And he was equally clear that his value was not a public fair market value, for he admitted that no one other than a present stockholder would pay any such price for the stock. [R. 682-3.]

This Court, the Supreme Court, and practically every other court in the land have renounced Grimes’ theory as a proper criterion of “fair market value.” The cases are cited in petitioners’ briefs in these cases heretofore filed. We respectfully urge that The Tax Court, in preferring the testimony of Grimes over the testimony of seven other witnesses, was not merely resolving conflicts in the testimony, but was adopting and relying upon an erroneous standard or criterion of value, and in so doing it committed an error of law which this Court has the power to correct, in line with the *Powers* case. It is plain from

the record that Grimes ignored earnings, future income taxes, other factors mentioned in Section 86.19 of Treasury Regulations 108, and in fact disregarded the very meaning of "fair market value." There being no testimony in the case, except Grimes', to support a value of \$900.00 per share, and that evidence not taking into consideration the earnings and other factors, it is evident that The Tax Court itself could not possibly have given consideration to the factors mentioned in the Regulations.

3. A third ground for rehearing is that this Court, as The Tax Court, erroneously assumed that Eitner, one of petitioners' witnesses, attempted to establish a fair market value of the oil properties, whereas he stated emphatically that he was not doing so. [R. 378-9.] In any event, it was erroneous for The Tax Court to consider only one portion of his testimony and not all of it, as he did determine a value of Dominguez stock of \$407.00. [R. 386.]

4. A fourth ground for rehearing is that the Court, we believe, erred in giving the same weight to the findings of fact made by a Judge who did not hear the evidence as it would to the findings of fact made by a Judge who did hear the evidence. This, we submit, is error. See *Howell Turpentine Co. v. Comm.*, 5 Cir., 162 F. (2d) 319, 325; *Howell v. Comm.*, 5 Cir., 162 F. (2d) 316, 317.

5. The Court in its opinion states with respect to the so-called sales of Francis and Dominguez stock:

"* * * The parties to these sales were related to each other. Petitioners therefore contend that these sales should not have been considered by The Tax Court in determining the fair market value of Francis and Dominguez stock on June 5, 1941. * * *"

We believe, with all due respect, that the Court has misconceived the main point of petitioners' argument. We do not contend that mere relationship between the parties *ipso facto* renders the sales irrelevant. But we do believe it is well settled in all phases of tax law that transactions between members of the same family should be closely scrutinized—in this instance for the purpose of ascertaining whether the transfers constituted representative arm's-length sales or were merely transfers at arbitrary figures. The record in this case conclusively shows the latter.

Thus, a matter not commented upon by the Court is that the alleged sales of Francis and Dominguez stock on January 18, 1939, and April 24, 1941, were not cash sales, nor were they even sales in consideration of interest bearing deferred payments. They were transfers to children in exchange for non-interest bearing notes. And the fact that they represented merely arbitrary values is shown by the transfer by one of the petitioners of both Francis and Dominguez stock on the same day (January 18, 1939) at exactly the same price, although it is conceded on all sides that the Francis stock was worth 10 per cent more than the Dominguez stock. The price used was the income tax cost basis of both stocks, since no loss could have been claimed upon such a sale for tax purposes in any event. The alleged sales of both stocks in October, 1936, were also for the same price.

Petitioners respectfully urge that transfers under such circumstances are not representative sales nor are they indicative of fair market value. To permit The Tax Court to be the sole judge of the materiality, relevancy, and therefore the admissibility of this evidence is, we believe, contrary to the excellent opinions of this Court in *Kinney's Estate v. Comm.*, 80 F. (2d) 568, 572, and

of the Third Circuit Court of Appeals in *Hazeltine Corporation v. Comm.*, 89 F. (2d) 513, 519.

It is also submitted that no consideration appears to have been given to the fact that we are concerned here with a depleting asset. The parties stipulated the diminishing returns expected to be realized from the oil properties, amounting to \$9,000,000.00 over a period of 25 years or more. Between 1936 and 1941 \$5,000,000.00 had been received, thereby exhausting one-third of the oil reserves. Sales of stock in 1936 are irrelevant in determining value of the stock in 1941, after one-third of a depleting asset has been exhausted; and we believe that an appellate court should not hesitate to strike down a Tax Court finding predicated upon evidence that is irrelevant, immaterial or incompetent. This Court did not hesitate to do so in the cases cited on page 28 of petitioners' opening brief.

6. As a final ground in support of this petition, attention is respectfully directed to the action of Congress in requiring a comparison with other similar companies. Section 811(k) of the *Internal Revenue Code* was added by Section 501 of the Revenue Act of 1943 and reads as follows:

“(k) Valuation of Unlisted Stock and Securities.— In the case of stock and securities of a corporation the value of which by reason of their not being listed on an exchange and by reason of the absence of sales thereof, cannot be determined with reference to bid and asked prices or with reference to sales prices, the value thereof shall be determined taking into consideration, in addition to all other factors, the value of

stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange.”

There was undisputed evidence in the record that the stocks of comparable companies were selling on the public market at prices reflecting a substantial discount below fair market value of their underlying assets (from 20 to 40 per cent in the case of companies owning liquid assets and as high as 75 per cent as to companies owning real estate). [R. 250-1, 381-4, 550.] The record also shows conclusively that stocks of the best representative companies were selling at from seven to twelve times earnings. [R. 247, 341-2, 625-6.]

We submit that The Tax Court’s valuation conclusively shows that it ignored this uncontradicted evidence and that it thereby disregarded the mandate of Congress. The earnings of Dominguez of \$48.00 per share, multiplied by 12, produce a figure of only \$576.00; and no discount from asset value was allowed by the Court at all.

In view of the foregoing we respectfully pray that this petition be granted.

A. CALDER MACKAY,
ARTHUR MCGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION,

Counsel for Petitioners.

State of California, County of Los Angeles—ss.

A. Calder Mackay and Adam Y. Bennion hereby certify that in their judgment the foregoing petition is well founded and is not interposed for delay.

A. CALDER MACKAY.

ADAM Y. BENNION.

Subscribed and sworn to before me this 5th day of March, 1948.

(Seal)

MARY E. WHITTHORNE,

Notary Public in and for Said County and State.

My commission expires November 26, 1949.

No. 11510

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAY H. MONTGOMERY and VICTOR KREMER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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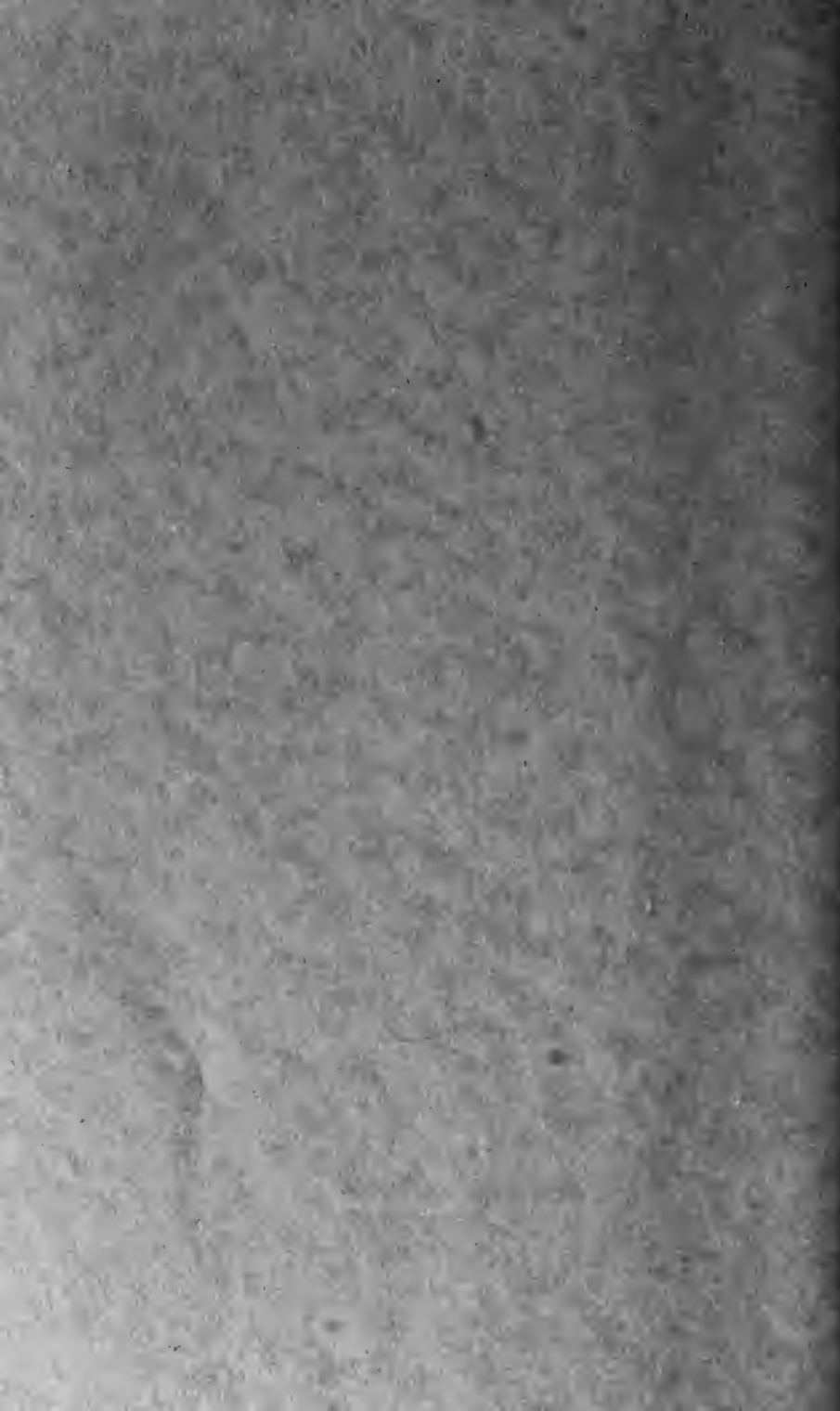
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FILED

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No. 11510

IN THE

United States Circuit Court of Appeals
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JAY H. MONTGOMERY and VICTOR KREMER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

*To the Honorable the Ninth Circuit Court of Appeals
of the United States:*

This is an appeal from the judgment of conviction of the defendant under an indictment charging the defendant with violation of Second Revised Ration Order No. 3 and possessing a ration commodity not in accordance with the provisions of said Regulation in Counts II, V and VI of the indictment.

The defendant Montgomery was committed to one year in jail on each of the counts to run concurrently. The defendant Kremer was sentenced to serve 3 months in jail on each count.

Judgment was pronounced December 16, 1946.

Notice of appeal was given December 23, 1946 for Montgomery; December 24, 1946 for Kremer.
[R. 17-18.]

Jurisdiction.

Jurisdiction is invoked under the provisions of Title 28 Section 225 U. S. Codes and under the Second War Powers Act, Title 50, U. S. Code, App. 633 *et. seq.*

The Facts.

The appellant was charged with Count II, acquiring and possessing 10,000 lbs. of sugar not in accordance with the provision of the Second Revised Ration Order No. 3 or any ration order.

Count V of the Indictment charged him with acquiring, possessing and using a ration document, to-wit; O. P. A. Ration Check for 105,216 pounds of sugar which check was not acquired in accordance with a ration order because the amount of said ration check was in excess of any sugar allotment or allowance of the defendant Victor Kremer to whom said check was issued and by whom it was received.

Count VI charged the defendant, in company with other defendants, with securing, using, permitting the use of, possessing and control of a ration document not issued, to-wit; and O. P. A. Ration Check for 125,000 pounds of sugar, which check was not acquired in accordance with a ration order because the amount of said ration check was in excess of any allotment or allowance of the defendant Jay H. Montgomery to whom said check was issued, and by whom it was received.

Specification of Error.

I.

The indictment fails to state an offense against the laws of the United States.

II.

The indictment charges multiple conspiracies.

III.

The indictment attempts to create an offense not by reason of any Statute but by reason of an Administrative Order.

I.

The Indictment Fails to State an Offense Against the Laws of the United States.

The indictment merely charges that the defendants wilfully acquired and possessed sugar not in accordance with certain regulations. Nowhere does the indictment charge that the defendants unlawfully acquired and possessed the sugar.

The word “wilfully” is not interchangeable with “unlawfully.” Without charging that the acts done were done unlawfully no offense against the laws of the United States was stated.

An indictment must charge a violation of law. Merely setting up facts which may constitute a violation of law does not overcome the presumption of innocence which surrounds an accused.

People v. Schmitz, 7 Cal. App. 330, 373;

U. S. v. Cruickshank, 92 U. S. 542.

In *People v. Schmitz* the court said (page 374) “In no case can an indictment be ended by imagination or presumption.”

II.

The Indictment Charges Multiple Conspiracies.

It charges an over-all general conspiracy in violation of Section 88 and then it charges separate individual conspiracies in the various counts. This violates principles set out in *Kotteokus v. U. S.*, 90 L. Ed. 1557.

Also, the indictment violates congressional intent in permitting a felony and misdemeanor conspiracy growing out of the same transaction to be charged.

III.

The Indictment Attempts to Create an Offense Not by Reason of Any Statute but by Reason of an Administrative Order.

The Second War Powers Act did not give the Administrator authority to issue Executive Orders with the same force and effect as if they were Statutes or with the same authority as was given to the Administrator of the Office of Price Administration. The result is that an attempt is made to create an offense by Executive Order. This is contrary to the power of the Administrator.

Schechter v. U. S., 295 U. S. 495;

Panama Refining Company v. U. S., 293 U. S. 388;

Faher v. Amman, 91 L. Ed. 1574, 1577.

WHEREFORE, the defendants pray that judgment against them and each of them be reversed.

Respectfully submitted,

MORRIS LAVINE,

DAVID H. CANNON,

Attorneys for Appellants.

No. 11510.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAY H. MONTGOMERY and VICTOR KREMER,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the cause under Section 2(a), Title III, of the Second War Powers Act of March 27, 1942, as amended (50 U. S. C. App. 633), and under Section 24 of the Judicial Code (28 U. S. C. 41(2)). Judgment against each of the appellants was entered on December 16, 1946 [R. 14, 15].¹ Notices of appeal were filed on December 23 and 24, 1946 [R. 17-18]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹References preceded by the letter "R" are to the printed record on appeal

Statement of the Facts.

On July 17, 1946, the Grand Jury in and for the Southern District of California, Central Division, returned an Indictment in six counts against the two appellants, and others, charging in Count One a conspiracy in violation of 18 U. S. C. §88, and in Counts 2 to 6, inclusive, substantive violations of the Second War Powers Act and ration orders issued pursuant to it [R. 2-9]. On October 29, 1946, appellants Montgomery and Kremer each withdrew their prior pleas of not guilty [R. 10] to Counts 2, 5, and 6 of the Indictment, and entered to each of those counts a plea of *nolo contendere* [R. 11]. On December 16, 1946, appellant Kremer was sentenced to imprisonment for a period of three months on each of Counts 2, 5 and 6, the sentences to run concurrently [R. 14], and appellant Montgomery was sentenced to imprisonment for a period of one year on each of Counts 2, 5 and 6, the sentences to run concurrently [R. 16]. Following sentence of the appellants upon those counts, Counts 1, 3 and 4 were dismissed as to each of the two appellants upon motion of the United States Attorney [R. 13, 14, 16].

ARGUMENT.

Point I.

Appellants assert (A.B. 3)² that the Indictment fails to state an offense for the reason that it does not say that the defendants “unlawfully” acquired and possessed the commodity which they are charged with having had in violation of the law.

Manifestly, the inclusion of the word “unlawfully” in an indictment is not a *sine qua non* to its sufficiency. See, e. g., *Schultz v. U. S.*, 155 F. (2d) 721 (C. C. A. 9). An indictment is sufficient if it charges the offense in the language of the statute. Here the statute makes it illegal for any person to act “wilfully” in the ways proscribed.³ And the indictment here so charges.

An examination of the forms of indictments which the Supreme Court of the United States has appended to the “New Rules of Criminal Procedure for the District Courts of the United States,” discloses that in no instance is the word “unlawfully” included in any indictment. (See Appendix of Forms, Forms 1-10, inclusive.)

We fail to see any possible relevancy to this case (A.B. 3) of appellants’ statement that “Merely setting up facts which may constitute a violation of law does not over-

²References preceded by “A.B.” are to appellants’ opening brief.

³50 U. S. C. A. §633(5) provides:

“Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provisions of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”

come the presumption of innocence which surrounds an accused." And the *Schmitz* and *Cruickshank* cases cited by appellants (A.B. 3) likewise appear to have nothing to do with this case.

The indictment here was plainly sufficient.

Point II.

Appellants assert (A.B. 4) that the Indictment charges multiple conspiracies in that it charges the conspiracy in Count One and then charges separate conspiracies in other counts. This contention is frivolous.

Count One charges a conspiracy in violation of 18 U. S. C. §88. Counts 2 to 6, inclusive, charge substantive violations of the Second War Powers Act, not conspiracies.

It is difficult to see how the appellants can in good faith make the assertions which they do as to the multiple conspiracies. Plainly, this Court should not be called upon to spend its time adjudicating non-existent controversies predicated upon utterly baseless contentions.

Nothing in the Indictment here violates any principle contained in the *Kottcakos* case, as asserted by appellants in their brief without further discussion or explanation (A.B. 4).

Moreover, appellants' pleas of *nolo contendere* were to Counts 2, 5 and 6, the misdemeanor counts charging substantive violations of the Second War Powers Act, not to the conspiracy count, count 1. Since the balance of the Indictment was dismissed as to these appellants, they plainly have no standing to complain as to any of the counts upon which they were not sentenced and which are, therefore, not before this Court.

Point III.

Likewise, without merit is appellants' aserption (A.B. 4) that the Indictment attempts to create an offense not by reason of any statute, but by reason of an administrative order.

This contention has been decided adversely to appellants by this Court in *Ruggiero et al. v. United States*, 156 F. (2d) 976 (C. C. A. 9, 1946), where it is stated at page 977:

“The statute itself makes a crime of the violation of regulations or orders made pursuant to the statute, and provides the penalties to be imposed. 50 U. S. C. A. Appendix, §633(5).

“It is clearly within the constitutional power of Congress to so impose criminal liability for the violation of an order or regulation promulgated by an administrative body.”

Moreover, it is established that a plea of guilty constitutes a waiver by the defendant of all defects and objections pertaining to the form of the indictment or information. *Forthoffer v. Swope*, 103 F. (2d) 707, 708 (C. C. A. 9, 1939); *Roberto v. United States*, 60 F. (2d) 774, 776 (C. C. A. 7, 1932); *Weir v. United States*, 92 F. (2d) 634, 635 (C. C. A. 7, 1937), cert. den. 302 U. S. 761; *Lindsay v. United States*, 134 F. (2d) 960, 962 (C. C. A. 10, 1943), cert. den. 319 U. S. 763; *Steffler v. United States*, 143 F. (2d) 772, 774 (C. C. A. 7, 1944), cert. den. 323 U. S. 746. And a plea of *nolo contendere* is equivalent to a plea of guilty for such purposes in the particular case in which it is entered. See, e. g., *United States v. Norris*, 281 U. S. 619, 1930.

Conclusion.

Counts 2, 5 and 6 of the Indictment clearly state an offense against the laws of the United States. Upon appellants' pleas of *nolo contendere* to each of those counts, the judgments entered were within the discretion of the trial court, and should be sustained.

Respectfully submitted,

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